Supreme Court, U.S.
FILED

091308 APR 26 2010

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No. 09-

IN THE
Supreme Court of the United States

MARTIN MARIETTA MATERIALS, INC.
and HUNT MARTIN MATERIALS, LLC,

Petitioners,

v.

CITY OF GREENWOOD, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Missouri Court of Appeals, in direct contravention of this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and fundamental principles of due process, committed constitutional error by upholding a $10 million punitive damages award imposed to punish conduct that a federal district court held to be lawful under a valid and enforceable contract and constitutionally protected by the Commerce Clause?

2. Whether the Missouri Court of Appeals erred in holding that Respondent was not required under Federal Rule of Civil Procedure 13(a) to bring its claims in this state court action as compulsory counterclaims in the federal action previously filed by Petitioners, given the significant overlapping factual and legal issues raised in the federal and state actions?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Martin Marietta Materials, Inc. is a publicly traded company with no parent companies. No publicly traded corporation owns ten percent or more of the stock of Martin Marietta Materials, Inc.

Petitioner Hunt Martin Materials, LLC is a limited liability company. Its sole members are: Martin Marietta Materials, Inc.; Martin Marietta Materials of Missouri, Inc.; and Hunt Midwest Mining, Inc. Martin Marietta Materials of Missouri is a wholly-owned subsidiary of Martin Marietta Materials, Inc. Hunt Midwest Mining, Inc. is a wholly owned subsidiary of Hunt Midwest Enterprises, Inc., a privately held corporation. Except as described above, no publicly traded corporation owns ten percent or more of the stock of Hunt Martin Materials, LLC, Hunt Midwest Mining, Inc., or Hunt Midwest Enterprises, Inc.

Respondent City of Greenwood, Missouri is a municipality.

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Petitioners Martin Marietta Materials, Inc. ("Martin Marietta") and Hunt Martin Materials, LLC ("Hunt Martin") respectfully petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case.

OPINIONS BELOW

The Missouri Court of Appeals' decision (1a-35a) is published at 299 S.W.3d 606. The Missouri Supreme Court's order denying review (63a) is not officially reported.

STATEMENT OF JURISDICTION

The decision of the Missouri Court of Appeals was entered on August 11, 2009. (1a) Petitioners' timely applications to the Missouri Supreme Court for a transfer to that court were denied without opinion on January 26, 2010. (63a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 13(a) is reproduced in the Appendix at page 64a.

STATEMENT OF THE CASE

Both this case and another previously-filed lawsuit between the parties in federal court arose out of the use of the roads in the City of Greenwood, Missouri, by trucks traveling to and from Petitioners' limestone quarry and Greenwood's efforts to ban that truck traffic from its roads. The two litigations created what the federal district court later termed an "'unseemly rift'" between the state and federal courts.[1] The trial of Respondent City of Greenwood's nuisance and other claims in the Missouri state trial court produced a $1.9 million compensatory award and a $10 million punitive damages award against Petitioners, which was imposed to punish the same conduct that the federal district court held was constitutionally protected. The federal court — considering largely the same factual assertions presented in the state court as to the volume of truck traffic[2] and the purported health and safety issues raised thereby — held that Greenwood's ordinance prohibiting Petitioners' customers' trucks from traveling through Greenwood violated the Commerce Clause. It also held that Greenwood's ordinance breached a 1991 contract between the parties regarding the use of Greenwood's roads by quarry customers. The federal proceeding resulted in a jury award of $468,209.89 in compensatory damages in favor of Petitioners and the entry of a permanent injunction barring Greenwood from taking any action that would have the effect of barring all through truck traffic from its roads.[3]

At the inception of these litigations, Greenwood's Second Avenue (and certain connecting roads) had

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[1] *Martin Marietta Materials, Inc. v. City of Greenwood*, 2008 WL 2700062, at *1 (W.D. Mo. July 10, 2008).

[2] The same (disputed) estimate of the approximate number of quarry-customer trucks a day (600) was before both courts.

[3] Greenwood's appeal in the federal case is pending in the United States Court of Appeals for the Eighth Circuit.

been used for decades by trucks traveling to and from Petitioners' quarry, which is located just south of Greenwood. During much of that time, Greenwood had designated by ordinance the Second Avenue route, which is the shortest route to Petitioners' quarry from Interstates 35 and 435, as the exclusive truck route running North-South through Greenwood. As Greenwood's Chief of Police testified, quarry-customer trucks "adhered to the imposed speed limits" (15 mph for trucks), and "few if any citations were issued to drivers of trucks traveling to or from the Quarry." (57a) There were no documented instances of accidents or injuries attributable to the truck traffic on Second Avenue. (45a n.1,57a)

In 1991, Petitioners and Greenwood entered into a written contract whereby Greenwood would use good faith efforts to continue to keep Second Avenue as a truck route through the City in exchange for Petitioners' funding of a culvert replacement on the route. The contract expressly "recognize[d] the importance to the Quarry's operations of continued access . . . via Second Avenue" and that the "commercial viability" of Petitioners' quarry depended on such access.[4] After the replacement of the culvert, Petitioners continued to fund road repairs to Second Avenue, and Greenwood continued to designate it as a truck route by ordinance.

Notwithstanding the 1991 contract, Greenwood enacted in July 2006 the first of a series of three ordinances that prohibited quarry-customer truck traffic on Second Avenue. Greenwood's First Ordinance prompted Petitioners to sue Greenwood on August 23, 2006 in federal court. During the approximately eleven months that the ordinances were in effect, Petitioners and their customers complied with the ordinances, which caused Petitioners to incur $1.4 million in additional

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[4] 1991 Contract at 1.

transportation costs and labor and suffer a loss of $2 million in profits. In addition, Greenwood's ordinances, while in effect, "cause[d] the affected trucks to travel more miles over arguably more dangerous roads potentially increasing rather than decreasing overall exposure to accidents and fatalities." (57a)

In the federal action, Petitioners asserted a claim for breach of contract and sought to invalidate and enjoin enforcement of the First Ordinance on both state law and constitutional grounds. Petitioners' complaint alleged that the First Ordinance, which banned trucks weighing over fifteen tons from using Second Avenue, thus effectively preventing quarry-customers' trucks from traveling through Greenwood, violated the Commerce Clause and breached the contract between Petitioners and Greenwood. On January 26, 2007, the federal district court invalidated the First Ordinance on state law grounds.

Four days later, on January 30, 2007, Greenwood enacted its Second Ordinance, which again had the effect of preventing quarry-customer trucks from traveling through Greenwood. Within an hour of enacting the Second Ordinance, Greenwood filed this action against Petitioners in Missouri state court, seeking a declaratory judgment that the Second Ordinance was valid and constitutional. Greenwood also asserted a negligence claim against Petitioners, alleging that Petitioners had repaired the Second Avenue route in a defective and unsafe manner.

On February 1, 2007, Greenwood enacted its Third Ordinance, which, like the Second Ordinance, prohibited commercial vehicles from traveling through Greenwood except on streets designated as commercial-use routes.[5] Because Greenwood did not

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[5] The Third Ordinance was enacted because Greenwood had not followed proper notice procedures in enacting the Second Ordinance.

designate any streets as commercial-use routes, the Third Ordinance again had the effect of prohibiting all quarry-customer truck traffic through Greenwood to and from Petitioners' quarry. Greenwood amended its petition in the state court action to ask for a declaratory judgment that the Third Ordinance was enforceable, alleging, *inter alia*, that "[i]n prior lawsuits, [Petitioners] have alleged that the City is prohibited from passing such an ordinance" and that "[t]he City disputes [Petitioners'] position."[6] The amended petition also re-alleged Greenwood's claim for the purported negligent repair of the roads.

Petitioners removed Greenwood's state court action to federal court and amended their federal complaint to challenge the validity and constitutionality of the newly-enacted Third Ordinance. Greenwood moved to dismiss that claim, contending that its state court suit, although filed after Petitioners' federal lawsuit, now had priority. Greenwood claimed that Petitioners' challenge to the new ordinance "request[ed] the same relief based upon the same facts as that of the State Court Lawsuit" and that therefore the "'first-filed' rule g[ave] priority" to the state court on that claim.[7]

The federal court rejected Greenwood's motion. Setting forth the "complex, and often convoluted" history of the litigation, the federal district court held that abstention was not warranted and that "[a]llowing the federal court action to proceed would [actually] result in less piecemeal litigation."[8] As the court explained:

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[6] Greenwood's First Amended Petition at 5, *City of Greenwood v. Martin Marietta Materials, Inc.*, No. 0716-CV-01579 (Mo. Cir. Ct. Feb. 1, 2007).

[7] Suggestions in Support of Defendant's Motion to Dismiss Count III at 3, *Martin Marietta Materials, Inc., v. City of Greenwood* [hereinafter *Martin Marietta I*], No. 4:06-0697-CV-WDW (W.D. Mo. Mar. 12, 2007).

[8] Order at 1, 4, *Martin Marietta I* (W.D. Mo. Apr. 18, 2007).

> [Petitioners'] federal court case involves not only a declaratory judgment claim but multiple other claims, including breach of contract . . . and violation of the Commerce Clause. [Greenwood's] state court case could easily be brought in federal court as jurisdiction exists over them as compulsory counterclaims. Both federal and state law apply to the parties' claims. [Greenwood] has asked the state court to determine whether the New Ordinance is enforceable. An analysis of the enforceability will necessarily raise the many federal issues [Petitioners] have raised in this case.[9]

On March 22, 2007, Petitioners moved in the federal court for a preliminary injunction against enforcement of the Third Ordinance. The court rejected Greenwood's arguments that the ordinance was justified by safety and nuisance-based concerns raised by the volume of truck traffic ("[a]pproximately 600 trucks a day"). (43a) The court entered a preliminary injunction against the enforcement of the Third Ordinance. The court found that Petitioners had shown a likelihood of success on the merits as to their breach of contract and Commerce Clause claims and had shown irreparable harm from the impact of the ordinance. (39a-40a,42a,44a) The United States Court of Appeals for the Eighth Circuit affirmed the entry of the preliminary injunction.

On the same day that the preliminary injunction was entered, the federal district court remanded Greenwood's state court action back to state court. In arguing for remand, Greenwood reversed its previous position and asserted that the state court action was "a separate and unrelated action," that "[t]he facts underlying [the state court] action [we]re distinct from those at issue in the Federal Lawsuit," and that the two suits were "mutually exclusive and

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[9] *Id.* at 4.

d[id] not meet the 'same case and controversy' requirement for supplemental jurisdiction."[10] The district court remanded, finding that, although Greenwood's claim for a declaratory judgment raised federal questions, that claim was not within the federal-question jurisdiction of the federal courts under *Missouri ex rel. Missouri Highway & Transportation Commission v. Cuffley*, 112 F.3d 1332, 1336-37 (8th Cir. 1997).

Following remand, Greenwood, over Petitioners' objection, amended its state court petition to add, *inter alia*, a nuisance claim based upon the high volume of truck traffic to and from the quarry on the Second Avenue route and a claim for punitive damages. Greenwood's nuisance claim substantially expanded the scope of the state court litigation and increased the factual overlap between the two cases. Greenwood presented the same allegations as to the number of quarry-customer trucks using Second Avenue and the purported health and safety concerns arising from the quarry-truck traffic both in attempting to establish in federal court that the putative local benefits of its Ordinance outweighed the burden imposed on interstate commerce and in state court as the basis for its nuisance claims and punitive damages. Petitioners moved to dismiss Greenwood's claims on the ground that Greenwood failed to pursue them as compulsory counterclaims in the already pending federal court action. The state court denied Petitioners' motion.

In March 2008, with the federal court's preliminary injunction still in effect, the state court action proceeded to trial.[11] The jury returned a

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[10] Plaintiff's Suggestions in Support of its Motion to Remand at 1-2, 9, *City of Greenwood v. Martin Marietta Materials, Inc.* [hereinafter *Greenwood I*], No. 4:07-CV-00157 (W.D. Mo. Mar. 12, 2007).

[11] In closing argument, Greenwood's counsel asserted that the federal court injunction did not permit Petitioners'

verdict in favor of Greenwood on its claims of negligence and nuisance, awarding $1.9 million in compensatory damages and $10 million in punitive damages ($7 million against Martin Marietta and $3 million against Hunt Martin).

Petitioners moved for a judgment notwithstanding the jury verdict and, in the alternative, a new trial. Petitioners argued, *inter alia*, that Greenwood's claims should have been brought as compulsory counterclaims in federal court and that the punitive damage award violated due process because it punished lawful and constitutionally protected conduct. Those motions were denied.

After the state court trial, Greenwood, on May 19, 2008, filed a motion in the federal district court for an emergency stay of the federal court proceedings. Greenwood argued that because the state court had already rendered a judgment, the federal court should abstain under the *Younger* and *Rooker-Feldman* doctrines. In support of its motion, Greenwood abandoned its previous position that the federal and state actions were dissimilar and unrelated. Greenwood now insisted that the issues in both lawsuits were the same — indeed, claiming that the "underlying facts [we]re common to the

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customers to drive 600 trucks on Greenwood's streets every day. Petitioners' counsel objected, pointing out that the federal court's order expressly referenced the 600 trucks purportedly using Greenwood's roads each day and asked the court for a correction, which the court refused. It should be noted that the number of trucks was disputed, and actual counts by the county showed that the highest number of all vehicles (not just trucks) on Second Avenue during July 2007 was 431 vehicles and the highest number in October 2007 was 583. Greenwood's expert estimated that between 50 and 70 percent of the vehicles were trucks (although not necessarily quarry-customer trucks).

claims in both cases," [12] that "[t]he issues of [Petitioners'] public nuisance and its effect on 'health, safety and welfare' [we]re common between the [two cases]," [13] and that the claims in the two cases "have obvious overlapping issues and facts." [14] The federal district court denied Greenwood's motion on June 27, 2008. The United States Court of Appeals for the Eighth Circuit also denied Greenwood's request for an emergency stay and allowed the case to proceed in the district court.

From June 30, 2008 through July 3, 2008, the federal district court held a bench trial on Petitioners' claims for, *inter alia*, breach of the 1991 contract and violation of the Commerce Clause. The court found as a matter of law that the contract was valid and binding and that Greenwood, by passing ordinances banning truck traffic, had breached its contractual duty to "make a good faith effort to keep Second Avenue open to trucks." (53a) The court held that "no credible evidence was presented indicating that the truck traffic actually represent[ed] a quantifiable threat to the health, safety and welfare of the citizens of Greenwood" and that "there was no evidence presented that Greenwood made a good faith effort to present its concerns to Martin Marietta and to investigate alternate solutions to the problems it purported to be addressing on Second Avenue." (*Id.*) The court also held that Greenwood's Third Ordinance "impose[d] a burden on interstate commerce that [was] clearly excessive in relation to the purported local benefits of the Ordinance" and permanently enjoined Greenwood from "taking any action that ha[d] the

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[12] Reply in Support of Defendant's Motion to Stay at 12, *Martin Marietta I* (W.D. Mo. June 18, 2008).

[13] *Id.* at 11.

[14] Reply in Further Support of Defendant's Motion in Limine to Exclude Evidence or Testimony Denying the State Court Judgment at 2, *Martin Marietta I* (W.D. Mo. June 24, 2008) [hereinafter "Reply re: Greenwood's Motion in Limine"].

effect of prohibiting all through-truck traffic through the City."[15] (59a-62a)

Petitioners appealed the state court judgments to the Missouri Court of Appeals, arguing, *inter alia*, that Greenwood's claims should have been brought as compulsory counterclaims in the federal court action and that the punitive damages award violated due process because it punished conduct that was lawful. Although Greenwood conceded in its own brief that there was "some 'logical relationship'" between the claims in both cases,[16] the Missouri Court of Appeals held that Greenwood's negligence and nuisance claims did not arise out of the transaction or occurrence that was the subject of the federal court action. (27a-29a) The Missouri Court of Appeals also upheld the judgment on Greenwood's nuisance claim and the award of punitive damages.[17] (9a,21a,33a)

Petitioners timely moved for rehearing in the Missouri Court of Appeals and, in the alternative, a transfer to the Missouri Supreme Court. The Missouri Court of Appeals denied these requests.

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[15] The district court "also note[d] that while Greenwood claim[ed] its action [was] necessary to protect the health and safety of the citizens, the Ordinance does not impact the truck traffic on Second Avenue to and from companies that are located within the city limits. One such company, Buckley Explosives, sends large trucks loaded with explosives on the Second Avenue route through Greenwood. This company is permitted to continue driving its trucks north on Second Avenue into the most densely residential portion of the Second Avenue route." (57a)

[16] Brief of Respondent, *City of Greenwood. v. Martin Marietta Materials, Inc.* [hereinafter *Greenwood II*], No. WD 69690, 2009 WL 854577, at *69 (Mo. App. Ct. Feb. 9, 2009).

[17] Because it upheld the award of compensatory damages based upon Plaintiff's nuisance claim, the Missouri Court of Appeals did not address Petitioners' challenge to the verdict on Greenwood's negligence claim. (23a)

Petitioners subsequently applied directly to the Missouri Supreme Court for a transfer to that court, which declined without opinion to review the case on January 26, 2010. (63a)

REASONS FOR GRANTING THE PETITION

The punitive damage award in this case punishes lawful conduct and thus is a fundamental violation of due process. As this Court stated in *BMW of North America, Inc. v. Gore*, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." 517 U.S. 559, 573 n.19 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Likewise, the infliction of punishment for conduct that a defendant justifiably believed to be reasonable and lawful "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law" and is "plainly arbitrary and oppressive." *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915); *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 & n.17 (1993) (discussing *Danaher*). The punitive damages award affirmed by the Missouri Court of Appeals is in direct conflict with these due process principles set forth by this Court. Certiorari should be granted to clarify the application of these principles and to address those circumstances in which *no* award of punitive damages is constitutionally permissible.

Respondent City of Greenwood is a government entity with the power to regulate by ordinance (providing the ordinance is constitutional) the very conduct for which it sought and obtained punitive damages — namely, truck traffic traveling on its roads to and from Petitioners' quarry. Until shortly before Greenwood filed its lawsuit against Petitioners, the Second Avenue route was, under Greenwood's ordinance then in effect, the only

designated truck route through the City. The use of that route was also authorized by a contract between Petitioners and Greenwood, whereby Greenwood promised to make good faith efforts to keep the Second Avenue route open in the future for quarry trucks. In addition, Petitioners reasonably believed, and the federal district court later held, that their customers' use of the roads was part of interstate commerce and entitled to protection under the Commerce Clause. Greenwood, deciding it would like to rid its streets of quarry trucks, not only changed its ordinance, but sought to punish Petitioners for their customers' use of the roads as permitted under its prior ordinance. In these circumstances, Greenwood's seeking of punitive damages and the Missouri courts' imposition and affirmation of the punitive damages award were arbitrary and oppressive, violated due process, and deprived Petitioners of fair notice that their conduct could subject them to punitive damages. *See Gore*, 517 U.S. at 574.

This Court also should grant certiorari to resolve issues as to the proper application of the compulsory counterclaim standard under Federal Rule of Civil Procedure 13(a). By requiring that logically related claims between parties be litigated in the same proceeding, Rule 13(a) not only promotes judicial economy, but prevents conflicts and inconsistencies between two courts attempting to adjudicate claims arising from the same transaction or occurrence. Such conflict is precisely what occurred in this case. As the district court found, Greenwood created an "'unseemly rift'" between the state and federal courts "by splitting this cause of action and arguing inconsistent positions before each court."[18] Indeed, Greenwood's decision to bring its claims in state court, instead of asserting them as compulsory counterclaims in the prior-filed federal court action, was an assault on Petitioners' choice of forum for its

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18 *Martin Marietta Materials, Inc.*, 2008 WL 2700062, at *1.

federal constitutional claims. The Missouri Court of Appeals' misapplication of the federal law on compulsory counterclaims and the existence of conflicting views in courts as to the meaning and application of Rule 13(a) present an important question of federal law that should be settled by this Court.

I. THE PUNITIVE DAMAGES AWARD IS CONTRARY TO THIS COURT'S DUE PROCESS JURISPRUDENCE AND IMPROPERLY PUNISHES CONDUCT THAT WAS LAWFUL AND CONSTITUTIONALLY PROTECTED

The jury in this case awarded $10 million in punitive damages to punish conduct by Petitioners that the federal district court determined to be lawful and protected by the Commerce Clause. The punished conduct was also the subject of a contract between the parties that the federal court found to be valid and enforceable and to have been breached by Greenwood. The punitive damages award directly conflicts with decisions by this Court holding that due process does not permit punishment for conduct that was lawful or for conduct reasonably believed to be lawful.

As this Court has stated, "'[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" *Gore*, 517 U.S. at 573 n.19 (quoting *Bordenkircher*, 434 U.S. at 363). Likewise, the infliction of punishment for conduct that a defendant justifiably believed to be reasonable and lawful "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law" and is "so plainly arbitrary and oppressive as to be nothing short of a taking of [the defendant's]

property without due process of law." *Danaher*, 238 U.S. at 490-91.

The imposition of punitive damages in such circumstances implicates the fundamental issue of fair notice to which all citizens are entitled under the Due Process Clause so that they can tailor their conduct to comply with the law and avoid punishment. Indeed, the very "point of due process — of the law in general — is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Thus, as this Court has held, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . ." *Gore*, 517 U.S. at 574; *accord Campbell*, 538 U.S. at 417. The punitive damages award in this case violates these elementary notions of fairness and conflicts with this Court's punitive damages jurisprudence. Review by this Court is therefore warranted.

A. Petitioners' Conduct Was Authorized by a "Valid and Enforceable" Contract Between Petitioners and Respondent

The undisputed history of the parties' conduct and the relations between the parties demonstrates that Petitioners' conduct in this case was lawful and that Petitioners reasonably believed it to be lawful. Trucks going to and from Petitioners' quarry had used the Second Avenue route for decades, as had other trucks. The Second Avenue route (prior to July 2006) had been designated by Greenwood as the exclusive truck route through Greenwood.

From 1991 on, the use of the road by Petitioners' customers — the very conduct for which Greenwood sought and was awarded punitive damages — was the subject of a contract between the parties. In that contract, which the federal district court found to be

"valid and enforceable" (61a), Greenwood "recognize[d] the importance to the Quarry's operations of continued access . . . via Second Avenue," acknowledged that the quarry's "commercial viability" depended on such access, and promised that it would try "in good faith to continue to designate Second Avenue as a 'Commercial Use Route.'"[19]

In return for Greenwood's promise to use good faith efforts to keep Second Avenue open, Petitioners agreed to pay for, and did pay for, a new culvert for the Second Avenue route. Thereafter, Petitioners continued to fund repairs for Second Avenue with the knowledge of and thanks from Greenwood officials. As the federal district court found, "[t]here is no dispute that Martin Marietta performed under the 1991 Contract" and the "evidence is undisputed that at Greenwood's request, [Petitioners] performed various repairs on Second Avenue." (51a-52a) Nor did Greenwood ever notify Petitioners that it believed their customers' use of the roads exceeded what was contemplated by the contract. (53a) The federal district court found that Greenwood, by enacting ordinances barring quarry truck traffic, breached the 1991 contract. (53a-54a)

Significantly, the conduct for which Petitioners were punished took place both while the Second Avenue route was the sole designated truck route through Greenwood to and from Petitioners' quarry and before Greenwood enacted its ordinances barring truck traffic on that route. Beginning in July 2006, during the times Greenwood had ordinances in effect barring quarry traffic from traversing the city, the quarry-customers' trucks complied with the ordinances. Thus, Petitioners reasonably believed their conduct was lawful. *Cf. Danaher*, 238 U.S. at 489-90 (where there was no "decision in the state holding or indicating that [the

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19 1991 Contract at 1-2.

company's practice] was unreasonable" and state legislature had not declared practice unreasonable, company was "well justified in regarding the [practice] as reasonable"). Greenwood's pursuit of punitive damages for conduct plainly allowed by the Greenwood ordinance in effect at the time and contemplated by Greenwood's contract with Petitioners was arbitrary, oppressive, and beyond the bounds of due process. *See Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 562.

Under these circumstances, it is evident that Petitioners' conduct, for which Greenwood sought and was awarded $10 million in punitive damages, was reasonable and lawful, and, in fact, acquiesced to by Greenwood. Punishment of this conduct is contrary to the constitutional guarantee of due process and conflicts with this Court's due process jurisprudence.

B. The Punitive Damages Award Impermissibly Punishes Conduct Protected Under the Commerce Clause

The punitive damage award also directly conflicts with the federal district court's determination that Greenwood's attempts to ban truck traffic to and from the quarry violated the Commerce Clause. Petitioners reasonably and correctly believed that their conduct was protected by the Commerce Clause. The federal district court agreed, holding that Greenwood's Third Ordinance unduly burdened interstate commerce, imposing a substantial burden on the quarry operations and on other vendors and service providers who traveled to and from the quarry or relied on truck traffic through Greenwood. (55a-60a)

In making its determination under the Commerce Clause, the district court properly applied this Court's *Pike* balancing test: "if a law does not

overtly discriminate against interstate commerce, the law will be stricken if the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.'" (55-56a (citing *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))). Considering much of the same evidence that was the basis of the Missouri state court jury's nuisance verdict and punitive damages award, the federal court found little to support the putative local benefits claimed by Greenwood. The court noted that Greenwood was "unable to produce any evidence of safety issues related to truck traffic" (56a), and that Greenwood "failed to demonstrate that the truck[] traffic represent[ed] a significant risk to the health and safety of the citizens of the city, that the . . . regulations in effect on Second Avenue route inadequately protect[ed] the health [or] safety of the citizens of Greenwood, or that the Ordinance alleviate[d] any risks to the health and safety of the citizens of the city in any quantifiable way." (57a) The court also found that "Greenwood could have addressed its concerns regarding the health and safety of its citizens with a lesser impact on interstate activities." (59a) As an example, the court said that "Greenwood's expressed concerns about the condition of Second Avenue could have been addressed in the same fashion they had been addressed in [previous years] — by asking [Petitioners] to repair the road." (*Id.*)

The court found, on the other hand, that Greenwood's ban on quarry-truck traffic imposed a "substantial" financial burden on Petitioners. (58a) The court pointed to the "extensive evidence of the impact on transportation costs of adding 16 miles to the round trip of every truck traveling to and from the Quarry." (*Id.*)

In weighing the burdens and benefits of the ordinance, the court also looked to the "cumulative effects of the challenged statute on other impacted

entities" and the "interstate effect on the market if several jurisdictions were to adopt similar [ordinances]." (58a (citing *U & I Sanitation*, 205 F.3d at 1069; *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989))). The court found that the ordinance had a "substantial impact on other entities relying on truck traffic through Greenwood," including Petitioners' customers and a concrete company located near the quarry. (58a) The court also found the ordinance "impose[d] irreparable harm to interstate commerce generally . . . [through] the potential balkanization of municipalities in Missouri and the resulting impact on users of Missouri's public roads . . . ." (60a) Thus, applying the *Pike* balancing test, the court correctly concluded that Greenwood's "ban on through-truck traffic impose[d] a burden on interstate commerce that [wa]s clearly excessive in relation to the purported local benefits of the Ordinance." (59a)

It is axiomatic that tort liability under state law is circumscribed by the Constitution and that constitutionally protected conduct cannot be the basis for tort liability. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964); *Snyder v. Phelps*, 580 F.3d 206, 217 (4th Cir. 2009), *cert granted*, 2010 WL 757695 (Mar. 8, 2010). Moreover, where a punitive damages award is based on conduct that includes both constitutionally protected and non-protected activity, the award must be restricted to the conduct that is not protected, and "'precision of regulation' is demanded." *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (citation omitted) (reversing civil damages award that encompassed both protected and non-protected conduct).

In *Gore*, this Court made clear that these principles apply in the context of the Commerce Clause and limit the states' "power to impose burdens on the interstate market" through punitive damage awards. 517 U.S. at 571-72. This Court also reiterated in *Gore* the well-established principle

that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Id.* at 572 n.17; *see also N.Y. Times Co.*, 376 U.S. at 265 ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

Here, the jury's award of punitive damages against Petitioners is based upon the very conduct that the federal district court held was lawful and constitutionally protected. The punitive damages award, if not overturned, will exert regulatory power in a manner that would substantially burden interstate commerce in the form of truck traffic through the City of Greenwood to and from Petitioners' quarry. The use of tort and punitive damages to achieve what the district court held Greenwood's ordinances could not constitutionally accomplish is forbidden by both the Commerce Clause and due process.

C. Petitioners Did Not Have Fair Notice That Their Customers' Use of the Designated Truck Route Through Greenwood Could Subject Petitioners to Punitive Damages

This Court has repeatedly held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . ." *Gore*, 517 U.S. at 574; *accord Campbell*, 538 U.S. at 417. The constitutionally-required fair notice is a heightened concern with punitive damages because, though they serve "the same purposes as criminal penalties," "defendants subjected to punitive damages in civil cases have not

been accorded the protections applicable in a criminal proceeding." *Campbell*, 538 U.S. at 417; *see also Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Without such safeguards, "'punitive damages pose an acute danger of arbitrary deprivation of property.'" *Campbell*, 538 U.S. at 417-18 (citation omitted); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2006); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-43 (1991) (O'Connor, J., dissenting). Accordingly, fair notice is crucial in ensuring due process with regard to punitive damages, *Campbell*, 538 U.S. at 418, which are "quasi-criminal." *Cooper Indus., Inc.*, 532 U.S. at 432 (citation omitted).

The touchstone of fair notice is that the law must be "reasonably clear at the relevant time that the [person's] conduct was criminal," *United States v. Lanier*, 520 U.S. 259, 267 (1997), such that the law is "sufficiently explicit." *Connally v. Gen. Contr. Co.*, 269 U.S. 385, 391 (1926). "Fair warning" is required "in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (*quoted in Lanier*, 520 U.S. at 265).

In the context of punitive damages, "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether this defendant had reason to believe that his specific conduct could result in a particular damage award." *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999). Where the law does not provide a person with fair notice that the conduct in which he or she otherwise would reasonably engage is forbidden, *see* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 13.8h, at 688 n.30 (8th ed. 2010), or where a person lacks the "opportunity . . . to avoid the consequences of the law," due process is violated. *Lambert v. California*, 355 U.S. 225, 229 (1957); *see Bouie v. City of Columbia*, 378 U.S. 347, 350-55 (1964). The

"point of due process — of the law in general — is to allow citizens to order their behavior." *Campbell*, 538 U.S. at 418; *accord Gore*, 517 U.S. at 574. When punitive damages are applied in such a way that a citizen cannot reasonably know in advance that his or her conduct is proscribed and will subject him or her to punishment, due process is violated.

Here, under the factual circumstances outlined above, *see* Points I.A & I.B *supra*, it is clear that Petitioners were not afforded any — let alone fair — notice that their customers' use of Second Avenue would subject them to a $10 million punitive damages award. Petitioners' belief that their conduct was lawful was vindicated when the federal district court ruled that their customers' use of Second Avenue was constitutionally protected under the Commerce Clause and permanently enjoined Greenwood "from taking any action that ha[d] the effect of prohibiting all through truck traffic through the City." (60a) The deprivation of fair notice is particularly stark because Greenwood was not a private plaintiff, but a government entity with regulatory powers over the conduct it later sought to punish through a lawsuit in tort. Instead of giving fair notice prospectively, Greenwood sought punitive damages for conduct that was lawful under its ordinances at the time of the conduct.

Furthermore, the punitive award provides no guidance for Petitioners' future conduct. It does not announce what the "certain line" is that must not be crossed. *See McBoyle*, 283 U.S. at 27. Rather, the possibility is left open that future Missouri juries could impose further punitive awards against Petitioners for any continued use of the Second Avenue route, essentially nullifying any contract-based or Commerce Clause right to the use of the route by their customers' trucks. Petitioners have "no mode of judicially testing . . . in advance of acting" what level of use may or may not be permissible under Missouri nuisance law. *See Danaher*, 238 U.S. at 490-91 (*quoted in TXO*, 509

U.S. at 454 n.17). The blunderbuss of Missouri punitive damages law is not the "precision of regulation" required when the conduct at issue is constitutionally protected. *See Claiborne Hardware*, 458 U.S. at 916.

The punitive damages award affirmed by the Missouri Court of Appeals conflicts with due process principles announced in this Court's decisions on punitive damages and other penalties. The Court should grant certiorari to address the fundamental due process concerns raised by the punitive damages award in this case.

II. THE MISSOURI COURT OF APPEALS' ERRONEOUS APPLICATION OF THE FEDERAL COMPULSORY COUNTER-CLAIM STANDARD RAISES IMPORTANT AND UNSETTLED ISSUES OF LAW WARRANTING THIS COURT'S REVIEW

More than four months after Petitioners filed their complaint in federal court challenging the legality and constitutionality of Greenwood's ban on quarry-truck traffic, Greenwood brought the present case against Petitioners in Missouri state court asserting tort and other claims based on the same set of operative facts as in the federal action. Greenwood has expressly stated, *inter alia*, that the federal action was "based upon the same facts as that of the State Court Lawsuit,"[20] that the "underlying facts [we]re common to the claims in both cases,"[21] that the claims in the two cases "have obvious

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[20] Suggestions in Support of Defendant's Motion to Dismiss Count III at 3, *Martin Marietta I* (W.D. Mo. Mar. 12, 2007).

[21] Reply in Support of Defendant's Motion to Stay at 12, *Martin Marietta I* (W.D. Mo. June 18, 2008).

overlapping issues and facts,"[22] and that "[b]oth cases involve[d] identical parties litigating claims revolving around identical issues . . . ."[23]

Notwithstanding Greenwood's admissions, the Missouri Court of Appeals rejected Petitioners' argument that Greenwood's claims in the state court action were barred because they should have been asserted as compulsory counterclaims in the previously filed and pending federal action. (27a-29a) Under Federal Rule of Civil Procedure 13(a) — which Greenwood and the Missouri Court of Appeals acknowledged governs the analysis[24] — Greenwood's claims clearly should have been brought as compulsory counterclaims in the federal action. Because Greenwood failed to do so, its claims in the state action were barred as a matter of federal law. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) ("A counterclaim which is compulsory but is not brought is thereafter barred . . . ."); *Polymer Indus. Prods. Co. v. Bridgestone/Firestone, Inc.*, 347 F.3d 935, 938 (Fed. Cir. 2003) (under Rule 13(a), "failure to assert a compulsory counterclaim constitutes a waiver of that claim").

The Missouri Court of Appeals' ruling conflicts with the primary goals that Rule 13(a) is meant to achieve. As this Court has held, Rule 13(a) is "designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *S. Const. Co. v. Pickard*, 371 U.S. 57, 60 (1962). "The Rule [i]s

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[22] Reply re: Greenwood's Motion in Limine at 2.

[23] Defendant's Response in Opposition to Plaintiff's Motion in Limine at 2, *Martin Marietta I* (W.D. Mo. June 11, 2008).

[24] Greenwood has conceded that this counterclaim issue presents a question of federal law and that state law is not controlling. Brief of Respondent, *Greenwood II*, 2009 WL 854577, at *64-67. Similarly, the Missouri Court of Appeals based its decision on Federal Rule of Civil Procedure 13(a). (27a-29a)

particularly directed against one who fail[s] to assert a counterclaim in one action and then institute[s] a second action in which that counterclaim bec[omes] the basis of the complaint." *Id.* In short, Rule 13(a) is intended to prevent precisely what happened in this case: After Greenwood failed to assert its claims as counterclaims in the federal action, it then instituted a state court action "in which th[ose] counterclaim[s] became the bas[es] of [its] complaint." *See id.* This Court should grant review not only because of the manifest error committed by the Missouri Court of Appeals in this case, but also to provide needed guidance to courts regarding the proper application of the compulsory counterclaim rule.

A. The Federal Compulsory Counterclaim Standard, Which the Missouri Court of Appeals Misapplied, Warrants Clarification by This Court

Rule 13(a) classifies as a compulsory counterclaim any claim that a pleader has against an opposing party that arises out of the "transaction or occurrence" that is the subject matter of the opposing party's claim and does not require adding another party over whom the court cannot acquire jurisdiction. Fed. R. Civ. P. 13(a). This Court, in discussing former Equity Rule 30, a predecessor rule to Rule 13(a), described "transaction" as "a word of flexible meaning" and one that "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593, 610 (1926). In applying Rule 13(a), courts have generally recognized that the words "transaction or occurrence" are to be "interpreted liberally in order to further the general policies of the federal rules and carry out the philosophy of Rule 13(a)." *Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1261 (7th Cir.

1977); *accord* 6 Charles Alan Wright, Arthur R. Miller, Mary K. Kane, *Federal Practice & Procedure* § 1410, at 50 n.1 (2d ed. 1990) (citing cases). Nevertheless, many courts — like the Missouri Court of Appeals here — have proceeded to apply an illiberal, unduly narrow interpretation of those terms. As one commentator has observed, courts have "los[t] sight of the policies of the counterclaim rule, the other joinder rules, and the Federal Rules [of Civil Procedure] as a whole. The 'transaction or occurrence,' which is intended to broaden joinder, is employed in many decisions as a restrictive test to deny joinder." Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 Creighton L. Rev. 699, 708 (2007).

Since Rule 13(a) first became effective in 1938, this Court has not had occasion to address Rule 13(a)'s "transaction or occurrence" language. The federal district courts and circuit courts have, in applying that language, created no fewer than four competing tests. As the Missouri Court of Appeals stated in this case, those "varying tests to determine whether a claim is compulsory" are:

> (1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
>
> (2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> (3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
>
> (4) Is there any logical relationship between the claim and counterclaim?

(28a (citing *Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 264 (8th Cir. 1979))).

Commentators have concluded that "[c]loser analysis of these four tests reveals some problems with each one," and that the first three, in particular, are subject to significant "deficiencies."[25] Wright et al., *supra* § 1410, at 58-61; *see also* McFarland, *supra* at 709-10 (criticizing all four tests). The present case illustrates the importance of Rule 13(a) to the proper functioning of the courts and demonstrates the urgent need for guidance from this Court as to the proper application of the compulsory counterclaim rule.

In this case, the Missouri Court of Appeals purported to apply the logical relationship test. (28a) "According to [that] test, any claim a party has against an opposing party that is logically related to the claim being asserted by the opposing party and that is not within the exceptions listed in Rule 13(a) is a compulsory counterclaim." Wright et al., *supra* § 1410, at 61. Greenwood conceded in the Missouri Court of Appeals that there was "some 'logical relationship' between the parties' respective claims [in the state and federal actions]; all of them [we]re logically connected to [Petitioners'] quarry, the harm caused to Second Avenue by their trucks, and

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[25] As commentators have explained, the first test is of "doubtful utility" because "[i]t assumes that . . . [a] defendant will be both motivated and able to determine before answering whether his claim must be asserted as a compulsory counterclaim under Rule 13(a). Yet, given the permissive nature of pleading under the federal rules, no one can be certain what the issues are until after the pleadings are closed and discovery is underway . . . ." Wright et al., *supra* § 1410, at 58. The second test "too is inadequate as an overall standard. Indeed, the doctrine applied by most courts seems to be the converse. That is, absent a compulsory counterclaim rule, a pleader is never barred by claim preclusion from suing independently on a claim that he refrained from pleading as a counterclaim in a prior action." *Id.* at 59. The third test is underinclusive because "some counterclaims may be compulsory even though they do not meet it." *Id.* at 60.

Greenwood's response to that harm."[26] Moreover, Greenwood acknowledged that "[t]he issues of [Petitioners'] public nuisance and its effect on 'health, safety and welfare' [we]re common between the [two cases]"[27] and that "both cases involve[d] identical parties litigating claims revolving around identical issues."[28]

The Missouri Court of Appeals misapplied the logical relationship test when it held that the claims in the federal action were not logically related to the claims in the state court action on the grounds that the federal action "involved the interpretation of a contract and questions of federal law related to the Commerce Clause" and the "tort claims brought in state court do not relate to the same question of law or fact," and "do not implicate the same evidence . . . ." (28a) However, as this Court has made clear, the fact that a claim and counterclaim "are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter." *Moore*, 270 U.S. at 610; *accord Vukich v. Nationwide Mut. Ins. Co.*, 68 F. App'x 317, 319 (3d Cir. 2003) ("[F]or a claim to qualify as a compulsory counterclaim, there need not be precise identity of issues and facts between the claim and the counterclaim; rather, the relevant inquiry is whether the counterclaim 'bears a logical relationship to an opposing party's claim.'") (internal quotation marks and citation omitted)).

Accordingly, courts and commentators have recognized that the application of Rule 13(a) does not depend upon whether the claims at issue are based on the same legal theory. Rather, contrary to the

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[26] Brief of Respondent, *Greenwood II*, 2009 WL 854577, at *69.

[27] Reply in Support of Defendant's Motion to Stay at 11, *Martin Marietta I* (W.D. Mo. June 18, 2008).

[28] Defendant's Response in Opposition to Plaintiff's Motion in Limine at 2, *Martin Marietta I* (W.D. Mo. June 11, 2008).

Missouri Court of Appeals' holding, claims in tort and claims in contract may be logically related and hence compulsory counterclaims when they are predicated upon the same set of essential facts. Wright et al., *supra* § 1410, at 51, 65. Indeed, courts have repeatedly held that a "[f]ailure to bring compulsory tort counterclaim in an action on [a] contract will bar a later independent action on the tort." *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1080 (5th Cir. 1984); *accord, e.g., Geisinger Med. Ctr. v. Gough*, 160 F.R.D. 467, 469-70 (M.D. Pa. 1994) (patients' medical malpractice counterclaims were an "offshoot of the same basic controversy as the [medical center's] claim [for unpaid medical bills]"); *Banner Indus. of N.Y., Inc. v. Sansom*, 830 F. Supp. 325, 327-28 (S.D. W. Va. 1993) (plaintiffs' defamation claims were compulsory counterclaims to defendants' previously filed action involving, *inter alia*, breach of contract claim).

Here, the Missouri Court of Appeals erred when it held that the federal and state actions "do not relate to the same questions of law or fact" and "do not implicate the same evidence . . . ." (28a) That holding is directly contradicted by the record. As noted above, Greenwood admitted that the federal action was "based upon the same facts as that of the State Court Lawsuit,"[29] that the "underlying facts [we]re common to the claims in both cases,"[30] that the claims in the two cases "have obvious overlapping issues and facts,"[31] and that "both cases involve[d] identical parties litigating claims revolving around identical issues . . . ."[32] Where, as here, there is an overlap of essential facts underlying

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[29] Suggestions in Support of Defendant's Motion to Dismiss Count III at 3, *Martin Marietta I* (W.D. Mo. Mar. 12, 2007).

[30] Reply in Support of Defendant's Motion to Stay at 12, *Martin Marietta I* (W.D. Mo. June 18, 2008).

[31] Reply re: Greenwood's Motion in Limine at 2.

[32] Defendant's Response in Opposition to Plaintiff's Motion in Limine at 2, *Martin Marietta I* (W.D. Mo. June 11, 2008).

a claim and possible counterclaim and the claims are offshoots of the same basic controversy between the parties, the counterclaim is compulsory under Rule 13(a). *See Moore*, 270 U.S. at 609-10; *Cent. W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 424 (6th Cir. 2007); *Vukich*, 68 F. App'x at 319; *Geisinger Med. Ctr.*, 160 F.R.D. at 469-70.

The facts and evidence that Greenwood relied upon in attempting to defend against Petitioners' Commerce Clause claim in federal court were the same facts and evidence that formed the basis of Greenwood's nuisance claims in state court. Specifically, Greenwood asserted in both cases that the volume of truck traffic on Second Avenue constituted a threat to the public's health, safety, and welfare. In the federal action, Greenwood argued that its ordinance prohibiting Petitioners' customers' trucks from using Second Avenue was justified in light of those risks and that the local benefit of its ordinance outweighed the burden it imposed on interstate commerce. In the state action, Greenwood argued that those same purported dangers to the public amounted to a nuisance. The logical relationship between Petitioners' claims in the federal action and Greenwood's claims in the state action is clear. As shown below, all the consequences that Rule 13(a) is meant to prevent were realized when the two sets of claims were tried in separate actions with deleterious effects on the fairness and consistency of the proceedings and on judicial economy.

B. The Missouri Courts' Misapplication of the Federal Compulsory Counterclaims Standard Is Contrary to the Goals of Rule 13(a)

Permitting Greenwood to bring its claims in state court was inconsistent with the purposes and philosophy of Rule 13(a). The Missouri courts'

misapplication of Rule 13(a) resulted in needless duplication of efforts in this case and conflicting and contradictory results of the two litigations. The factual issues related to the use of Second Avenue by Petitioners' customers' trucks and the alleged health and safety risks that it posed to the citizens of Greenwood was extensively litigated in trial and pre-trial proceedings in both the state and federal actions. Judicial economy would have been served if the Missouri courts had correctly applied Rule 13(a) and allowed the issues to be resolved together in one forum. *See Pickard*, 371 U.S. at 60 (Rule 13(a) is "designed to . . . achieve resolution in a single lawsuit of all disputes arising out of common matters").

As the federal district court later made clear, Greenwood's assertion of its claims in state court, instead of in the federal proceeding as counterclaims, threatened the integrity of the judicial process. For example, by initially crafting its state court petition narrowly and persuading the federal court that the two cases were "mutually exclusive,"[33] Greenwood was able to secure remand of its case back to state court. After remand, however, Greenwood then expanded its state court petition to include a nuisance claim that was based on the same facts at issue in the federal action. This was a transparent attempt by Greenwood to circumvent the federal court's jurisdiction and prevent the resolution of related issues in a single forum. When Greenwood obtained a favorable jury verdict and ruling on its request for a declaratory judgment in state court, it returned to federal district court to argue that the actions were in fact similar and that the federal court should therefore stay its proceedings. Greenwood's disingenuous litigation tactics did not go unnoticed, and the federal court admonished Greenwood in a written order:

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[33] Plaintiff's Suggestions in Support of its Motion to Remand at 9, *Greenwood I* (W.D. Mo. Mar. 12, 2007).

> The Court is disturbed by the state of affairs in this dispute and increasingly frustrated by the conduct of the City of Greenwood or its counsel. Greenwood asserts . . . that this Court "has substantially overplayed its hand and created an unseemly rift between the state and federal courts." After review of the filings and transcripts of the various proceedings in both federal and state court, it appears to this Court that Greenwood is largely responsible for any "unseemly rift between the state and federal courts" by splitting this cause of action and arguing inconsistent positions before each court. The City has repeatedly represented to both courts that the claims raised in each cause of action are distinct and unrelated, an argument that cannot be reconciled with the position it now takes in this Court. . . . Although this Court had an opportunity to consolidate these cases when the state court action was removed, remand was required based on the record before it at the time of removal. The Court is of the opinion that if all issues and claims had been honestly presented during the early phases of this dispute, either here or in state court, the present predicament would have been avoided.[34]

By misapplying Rule 13(a), the Missouri Court of Appeals allowed Greenwood to benefit from its abusive gaming of the two judicial systems. This Court should grant certiorari to correct the Missouri Court of Appeals' erroneous application of Rule 13(a) and to provide needed clarity to the law regarding compulsory counterclaims.

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[34] *Martin Marietta Materials, Inc.*, 2008 WL 2700062, at *1.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

DECISION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, DATED AUGUST 11, 2009

In the Missouri Court of Appeals
Western District

CITY OF GREENWOOD, MISSOURI, RESPONDENT,	)	WD69690
	)	CONSOLIDATED WITH
v.	)	WD69787
	)	FILED: AUGUST 11,
MARTIN MARIETTA MATERIALS, INC., ET AL., APPELLANTS.	)	2009

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE JACK RICHARD GRATE JR, JUDGE

Before Division Three: Harold L. Lowenstein, Presiding Judge, Joseph M. Ellis and Lisa White Hardwick, JJ.

This suit arises from the use of a city street by trucks transporting rock from a quarry. Trucks carrying crushed rock pass through the city from a quarry located just south of the plaintiff city to a state highway north of the city. The City of Greenwood ("Greenwood") brought suit for public

nuisance — the unreasonable interference with a community right — and negligence — for improper repair of damage to a city street — against the quarry owners, Martin Marietta Materials, Inc. ("Martin Marietta) and Hunt Martin Materials LLC ("Hunt Martin"). The jury returned a verdict for Greenwood awarding both compensatory and punitive damages. Martin Marietta and Hunt Martin appeal that judgment and the trial court's judgment that a Greenwood ordinance limiting commercial truck traffic was valid and enforceable under Missouri law. This court affirms the judgment of the trial court in all respects except that portion dealing with the post-judgment interest rate, which was incorrectly calculated.

I. FACTUAL BACKGROUND

The facts, viewed in a light favorable to the judgment are as follows:

The City of Greenwood ("Greenwood") was the plaintiff in the underlying action and respondent here on appeal. Greenwood is a fourth class city of approximately 4,000 residents located in southern Jackson County. The defendants in the underlying suit, and appellants here, are Martin Marietta Materials, Inc. ("Martin Marietta"), a world-wide operator of quarries, and Hunt Martin Materials, LLC ("Hunt Martin"), a company formed in 1995 by Martin Marietta and Hunt Midwest Mining (collectively "Appellants"). The defendants each own fifty percent of the Greenwood Quarry ("the Quarry"), producing crushed limestone rock on more than 1,000 acres in northern Cass County.

The Quarry has been in operation for more than fifty years. Two routes are available for trucks transporting crushed rock from the Quarry to state highways. The route in dispute here runs approximately 1.25 miles from the Quarry to State

Highway 150, then to Highway 291. Quarry trucks use Second Avenue, Walnut Street, and Fifth or Sixth Avenue (collectively "Second Avenue") to reach Highway 150, the major east-west route.[1]

Second Avenue is a paved country road that borders the eastern edge of Greenwood. At places, the road is no more than twenty feet wide. The road was constructed without shoulders, sidewalks, or curbs. The speed limit along Second Avenue was fifteen miles per hour for trucks and twenty-five miles per hour for other vehicles.

The first half mile of the route, running south from Highway 150, proceeds through a residential area where the route takes a sharp turn. Some homes in this area are sited only thirty feet from the road. The homes generally have direct access to Second Avenue. Adjacent properties in the next quarter mile of the route are residences on larger lots or properties put to agricultural use. The last half mile inside the Greenwood city limits is abutted by commercial and industrial areas or undeveloped properties.

Martin Marietta purchased the Quarry in 1991. Yearly production at the Quarry increased steadily from 1991 to 1996, from approximately 600,000 tons to 885,000 tons. In 1996, Hunt Materials purchased fifty percent interest in the Quarry. Production and the resulting truck traffic increased dramatically with subsequent expansion. In 1997, the Quarry produced more than 1.14 million tons of rock per year. Production peaked in 2001 at 1.65 million tons. In 2005, the Quarry produced 1.42 million tons.

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[1] A second route requires trucks to take Highway BB to Highway 58 to access Highway 291. The second route is approximately eight miles longer each way. Martin Marietta characterized the alternate route as narrow, rough, and rutty.

Truck traffic began roughly at 6:30 a.m. and continued until after 5:00 p.m. Unloaded trucks proceeded southbound on Second Avenue to the Quarry. Fully loaded trucks — dump trucks carrying 28 tons or semi-trailer trucks carrying 42 tons — proceeded northbound on Second Avenue from the Quarry to Highway 150. An engineering study, commissioned by Greenwood, indicated that as many as 555 trucks use Second Avenue during the Quarry's peak season — almost a truck a minute. The average road usage, based on production tonnage, ranges from 240 to 350 trucks per day, or one truck about every two minutes.

The volume of truck traffic through city streets created problems for residents and businesses and complaints to the city. Neither residents nor businesses could leave their doors or windows open because of the noise and dust. Residents could not maintain gardens or yards along the route because of the dust. One resident testified that she would sweep more than six inches of dust from the end of her driveway every six months.

The truck traffic also raised safety concerns. Residents could not allow their children to play in their front yards or ride their bikes in the vicinity of Second Avenue because of the trucks. The constant truck traffic rendered the route too dangerous to maintain a bus stop; school children were required to be picked up by the bus at their doors.

As the road was not wide enough for two big trucks to pass each other comfortably, one truck would pull over to the side of the road to allow the other truck to pass. The truck traffic along Second Avenue caused community members to avoid the route. However, no accidents involving trucks were reported in the five years preceding the filing of this suit.

The volume of loaded trucks using the northbound route caused damage to Second Avenue. As the road

periodically began to fail, Martin Marietta undertook patching and asphalt overlays to repair the road. Whether this was done with the complicity of Greenwood or in response to complaints from citizens or complaints from the truck drivers was a matter of contention at trial. However, the evidence established that Martin Marietta did not seek permits or engineering studies before undertaking repairs. Between 1993 and 1999 Martin Marietta took bids and hired contractors to do concrete patching and asphalt overlays. Martin Marietta designated the areas to be repaired, hired the contractors, oversaw and paid for the work. At one point, an employee of Martin Marietta tried concrete instead of asphalt in one area. In 2000 and 2001, concrete in the northbound lanes of Second Avenue was patched.

The repeated patches and overlays resulted in a "big quilt" of seams and patches. The asphalt overlay covered three city manholes. The use of both asphalt and concrete caused heaves and swales that retained water after rainfall. The repeated asphalt overlays created dangerous drop-offs and uneven surfaces that cause vehicles to "bottom out" or scrape against the road surface. Deteriorating concrete revealed rebar in the street. Eventually, the continued heavy usage and piecemeal repairs caused the entire road to fail.

II. PROCEDURAL POSTURE

In July 2006, Greenwood passed an ordinance that limited the weight of trucks using Greenwood city streets. The ordinance effectively closed Greenwood streets, including Second Avenue, to Quarry truck traffic. Martin Marietta and Hunt Martin brought suit against the city in U.S. district court seeking to invalidate and enjoin enforcement of the ordinance. They asserted that Greenwood's actions were in violation of a 1991 contract between the Quarry

owners and the city and interfered with interstate commerce. The federal plaintiffs sought, and were granted, a preliminary injunction to prevent enforcement of the ordinance.

In January 2007, Greenwood passed a second ordinance that prohibited commercial vehicles on all city streets. Greenwood then brought the instant case seeking: (1) a declaration that the ordinance was valid and constitutional under Missouri law; (2) compensatory and punitive damages for negligence for the improper repair of Second Avenue; [2] (3) compensatory and punitive damages for public nuisance for unreasonable use of a public road; and (4) compensatory and punitive damages for trespass. On February 1, 2007, Greenwood passed a third ordinance that prohibited "through" commercial vehicles except on commercial use routes [3] and amended Count I of their petition seeking the declaratory judgment of validity of the February 2007 ordinance.

The defendants attempted to remove the action to federal court. The district court remanded the action for lack of federal question jurisdiction.

Four counts of Greenwood's five count petition were tried to a jury. In Count II, Greenwood sought damages for negligence related to the unauthorized and unsafe repairs to Second Avenue. In Counts III and IV, Greenwood asserted that the defendant's excessive use of Second Avenue by heavy trucks constituted nuisance. In Count V, Greenwood contended that Martin Marietta trespassed when it caused contractors to enter onto Second Avenue and

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[2] Greenwood asserted that the defendants assumed a duty to repair the road but then did so in a defective and unsafe manner, and were, thereby, negligent in repairing the road.

[3] Greenwood did not designate any city street as a commercial use route.

make unlawful repairs. Greenwood sought both compensatory and punitive damages.

The jury returned verdicts for Greenwood on the negligence and nuisance claims but found for the defendants on Count V, trespass. The jury awarded total compensatory damages of $1.9 million for negligence and nuisance and punitive damages of $7 million against Martin Marietta and $3 million against Hunt Martin.

A bench trial was held on Greenwood's Count I that sought a declaratory judgment that the ordinance complied with state law. The trial court entered judgment concluding that the city's ordinance "is valid and enforceable pursuant to Missouri law."

III. ANALYSIS

In eleven points, many with several subparts, appellant Martin Marietta challenges the pleading and submissibility of nuisance, the submissibility of negligence, the pleading and submissibility of punitive damages, and the trial court's judgment on the declaratory judgment. Martin Marietta also claims that Greenwood's tort claims should have been brought as compulsory counterclaims in the federal suit. Appellant Hunt Martin raises three points of error that are, for the most part, duplicative of Martin Marietta's claims. Appellants' points of error are addressed out of the order in which they were raised in their briefs and grouped in order to facilitate analysis and understanding.

A. Nuisance

1. Sufficiency of the pleading

In Point IV, Martin Marietta asserts that the Greenwood petition plead that traffic on Second Avenue created a nuisance. Relying on *Grommet v. St. Louis County*, 680 S.W.2d 246, 251 (Mo. App. 1984), Martin Marietta argues that traffic cannot be the basis for a nuisance claim. Martin Marietta contends, for the first time on appeal and without citation to relevant legal support, the only basis that Greenwood could assert for public nuisance regarding a public street was that the defendants create a physical obstruction. Accordingly, Martin Marietta contends that Greenwood's petition failed to state a claim upon which relief could be granted.

The failure to raise sufficiency of the petition before the trial court does not constitute waiver. ***Atkinson v. Smothers*, 291 S.W.2d 645, 648 (Mo. App. 1956)**. The question of the sufficiency of the petition may be raised at any time, including upon appeal. ***Id.*** Where, however, the sufficiency of the petition is raised for the first time on appeal, "the pleadings should be construed with reasonable liberality to prevent entrapment, unless it wholly fails to state a cause of action." ***Id.* at 648-49.** "[A] petition will be found sufficient after verdict if, after allowing reasonable inferences and matters necessarily implied from the facts stated, there is sufficient to advise defendant with reasonable certainty as to the cause of action it is called upon to meet and bar another action for the same subject-matter." ***Barber v. Allright Kansas City, Inc.*, 472 S.W.2d 42, 44 (Mo.App.1971)** (internal quotation omitted). "If the allegations invoke principles of substantive law entitling a plaintiff to relief, the petition should not be dismissed." ***Norber v. Marcotte*, 134 S.W.3d 651, 657 (Mo. App. 2004)**.

In Count III of its petition, Greenwood asserted that "Defendants' truck traffic annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community." The petition sets forth, additionally, that "[t]he high volume of truck traffic leaving Defendants premises traveling through the City substantially impairs common community rights including: public health, safety, peace and convenience." At trial, Greenwood based its nuisance claim on the noise and dust generated by the trucks, the unreasonable use of a public street by heavy trucks that resulted in the damage to the street, and the safety issues caused by a failing road.

According Greenwood, the benefit of reasonable inferences arising from the facts alleged in the pleading, the petition set forth facts sufficient to apprise the defendants of the cause they were required to defend, specifically public nuisance. Point denied.

2. Submissibility

In Points IV through VI, Martin Marietta contends that the trial court erred in failing to grant motions for directed verdict and judgment notwithstanding the verdict because Greenwood failed to make a submissible case for public nuisance. Martin Marietta raises six points challenging the submissibility of Greenwood's nuisance count: three points challenge the theory of nuisance propounded by Greenwood and three points assert that Greenwood failed to provide substantial evidence on elements of their claim. Hunt Martin joins in two points challenging the sufficiency of the evidence to support submissibility.

The denial of a motion for judgment notwithstanding the verdict is reviewed to determine whether a submissible case was made. ***Smith v.***

Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 759 (Mo. App. 2008).** A submissible case is made where the plaintiff presents substantial evidence for every element of the claim. ***Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 832 (Mo. App. 2005).** Review of whether substantial evidence exists is de novo. ***Id. "In determining whether a submissible case was made, this court views the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the prevailing party." ***Id.*** "Granting a judgment notwithstanding the verdict is a drastic action, and an appellate court will not overturn a jury's verdict unless there are no probative facts to support it." ***Smith*, 275 S.W.3d at 759.**

Public nuisance encompasses "any unreasonable interference with a right common to the general public." ***Jackson v. City of Blue Springs*, 904 S.W.2d 322, 328-29 (Mo. App. 1995) (*quoting* 58 Am.Jur.2d Nuisances § 33 (1989)).** A public nuisance is an offense against the public order and economy of the state and violates the public's right to life, health, and the use of property, while, "at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons." ***City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 535 (Mo. App. 2001) (internal quotation marks omitted).** Whether a particular use is reasonable or unreasonable is an issue for the jury and "does not depend on exact rules but on the circumstances of each case including the locality and character of the surroundings, the nature and value of the use and the extent of harm involved." ***Davis v. J.C. Nichols Co.*, 714 S.W.2d 679, 684-85 (Mo. App. 1986).**

Martin Marietta raises three challenges to Greenwood's theory of public nuisance. Two of the claims of error are unpreserved for appellate review in that Appellants propound these theories for the first time on appeal. In Point V, Martin Marietta

claims that Greenwood's theory of off-premises liability was not supported in the law and, in Point IV, claims that the only way Greenwood could show a nuisance arising from the use of a public street was by demonstrating that the trucks created a physical obstruction of the public roadway. Neither of these theories was presented to the trial court or included in the defendants' motions for directed verdict or judgment notwithstanding the verdict.

"Appellate courts are merely courts of review for trial court errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court." ***Robbins v. Robbins*, 328 S.W.2d 552, 555 (Mo. 1959) (internal quotation marks omitted).** "An appellate court will not, on review, convict a trial court of error on an issue that was not put before it to decide." ***Mitalovich v. Toomey*, 217 S.W.3d 338, 341 (Mo. App. 2007).** Where, as here, the defendant challenged the submissibility of the nuisance count on a number of bases at trial, the defendant cannot, on appeal, challenge submissibility under a different theory. ***In re Marriage of Dooley*, 15 S.W.3d 747, 753 (Mo. App. 2000)** ("[A]s a general rule, 'a party cannot try his case on one theory in the trial court and, if unsuccessful, rely upon a different theory on appeal.'")

As these claims were not properly preserved for appellate review, they are only reviewable for plain error. ***See Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 723 (Mo. App. 2004).** Plain error review is discretionary and rarely granted in civil cases. ***Hunsucker v. Fischer*, 221 S.W.3d 433, 435 (Mo. App. 2006).** Such review is appropriate only where "the error affected substantial rights and a manifest injustice or miscarriage of justice resulted therefrom." ***Ruzicka v. Ryder Student Transp. Servs., Inc.*, 145 S.W.3d 1, 15 (Mo. App. 2004).** "Plain error does not mean prejudicial error; 'plain error places a much greater burden on [the party asserting it] than an assertion of prejudicial error

[does].'" *City of Kansas City v. Jordan*, 174 S.W.3d 25, 46 (Mo.App.2005) *(quoting Davolt v. Highland*, 119 S.W.3d 118, 135-36 (Mo. App.2003)).

Martin Marietta's claim that nuisance may only arise from the unreasonable use of one's own property is not supported in the law. "Property ownership is not a prerequisite to nuisance liability." *Rosenfeld v. Thoele*, 28 S.W.3d 445, 452 (Mo. App. 2000) (*quoting* 58 Am. Jur. 2d *Nuisances* § 117 (1989)). Indeed, "one who creates a nuisance *whether on his property or not*, is liable for the damage caused thereby." *Id.* at 451-52 (emphasis added) (internal quotations omitted). Martin Marietta's claim that nuisance arising from the defendant's use of a public roadway will only be found upon a determination that the use constituted a physical obstacle is equally unfounded. A showing of nuisance does not require "that there should be an actual physical obstruction to the public use upon the surface of the highway." *Loth v. Columbia Theater Co.*, 94 S.W. 847, 852 (Mo. 1906) (*quoting* Elliott on Streets and Roads (2d Ed.) §§ 647, 648, 695). Indeed, "[a]n unauthorized use of a highway, so extensive or so long continued as to be unreasonable may amount to a nuisance." *Id.* (*quoting* Elliott at §§ 647, 648).

In that Martin Marietta's first two claims are not supported in the law, they do merit plain error review. Accordingly, this court declines to make such a review. Point denied.

In Point IV, Martin Marietta argues that Greenwood's theory of nuisance was not supported in the law because, as a matter of law, traffic alone cannot constitute a nuisance. This claim was properly preserved for appellate review.

Martin Marietta relies on *Grommet v. St. Louis County*, 680 S.W.2d 246 (Mo. App. 1984), in which the eastern district of this court held that "[t]he

mere driving of automobiles on the paved portion of the roadway or on the unpaved portion of the roadway easement cannot be considered a nuisance. The public is entitled to the full and free use of all the territory embraced within a public roadway." ***Id.*** **at 252.** ***Grommet*** is inapplicable here. First, ***Grommet*** dealt with a nuisance suit brought by eight homeowners whose property abutted a street providing access to an elementary school. ***Id.*** **at 249.** School employees and delivery trucks created traffic congestion but, the court noted, the plaintiffs did not provide any evidence that the individuals using the road to access the school drove unreasonably while on the public road. ***Id.*** **at 250-52.** The lack of evidence of unreasonable use defeated the nuisance claim.

Here, the issue for the jury was whether the trucks' use of Second Avenue was reasonable. Greenwood presented evidence that volume of truck traffic on a narrow paved country road was unreasonable. Greenwood presented additional evidence of dust, noise, fumes, and safety issues for both the residents of the area and the traveling public. From the evidence, the jury could conclude that the Quarry trucks' use of the road was unreasonable.

Greenwood's action did not arise from congested roads, as in ***Grommet***, but arose from the effect of large trucks transporting crushed rock at times through a residential area at the rate of one every one to two minutes. ***Grommet*** does not control here. Point denied.

Both Martin Marietta and Hunt Martin question whether Greenwood made a submissible case on two elements of their claim. In Point VI, Martin Marietta asserts that Greenwood failed to demonstrate that the nuisance affected the whole

community.[4] They argue that the nuisance affected, at most, a few residents and businesses and that a nuisance that merely affects an individual or a group of individuals is private, rather than public, nuisance. They conclude that, because Greenwood failed to show that the whole community was affected, the city failed to make a submissible case for public nuisance.

In determining whether the Appellants' activities constituted a public nuisance, this court must look to both the location of the alleged nuisance and those who may be affected by the nuisance. ***City of Kansas City v. New York-Kansas Bldg. Assoc., L.P.*, 96 S.W.3d 846, 857 (Mo. App. 2002).** A public nuisance is more likely to be found where:

> the alleged nuisance is located in a public place, a place where the public is likely to congregate, a place where the public has a right to go, or a place where the public is likely to come into contact with the nuisance. A nuisance is public when it affects rights to which every citizen is entitled such as traveling on a public street.

Id. (internal citations omitted). A nuisance may be found where the unreasonable use "obstructs the rights or property of the whole community, *or neighborhood, or of any considerable number of persons.*" ***City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 535 (Mo. App. 2001) (internal quotation marks omitted; emphasis added).** A public nuisance that impinges upon a public right is not necessarily converted into a private nuisance because the nuisance disproportionately affects certain members of the community. ***Id.*** A public nuisance may be found where "the extent of the annoyance, injury or damage may be unequal, or

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[4] This same claim is raised in Hunt Martin's Point II.

may vary in its effect upon individuals." *Id.* **(internal quotation marks omitted).**

Greenwood asserted that the nuisance arose from the Quarry's unreasonable use of a public road. Greenwood presented testimony that the dust and noise of the trucks prevented residents and business people from fully enjoying their own property to the extent that they could not maintain a garden or a yard because of the dust, or leave their doors and windows open because of the dust and noise. Greenwood also presented evidence that residents did not feel it was safe for their children to ride their bikes on neighborhood streets or even stand at a bus stop. An engineer testified that the northbound lanes, the lanes that bear the load from the laden trucks going from the Quarry to the highway, were deteriorating from the constant heavy weight, and certain aspects of this deterioration created a safety issue for the traveling public.

From the evidence presented, the jury could conclude that the Appellant's unreasonable use of the road interfered with a public right to full, free, and safe use of a public road and was, therefore, unreasonable. The testimony of the residents about the effect of the truck traffic on the properties near Second Avenue and the safety issues raised by an engineer's testimony was sufficient to establish that the Appellants' activity affected the community as a whole. Just because residents directly abutting the route were disproportionately affected does not necessarily render the public nuisance a private nuisance. Point denied.

Martin Marietta next asserts in Point VI that Greenwood failed to provide substantial evidence that the trucks created a substantial interference. Appellants argue that Greenwood failed to provide objective evidence, such as testing or monitoring of air quality, noise volumes, or emission levels. Appellants also contend that Greenwood failed to demonstrate that the trucks create a public safety

problem because Greenwood could not show any vehicle accidents on Second Avenue caused by a Quarry truck.

Substantial evidence is evidence, "which if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case." ***Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. banc 2003)** (internal quotations and citations omitted).

Greenwood presented evidence that trucks travel the Second Avenue route at a rate of one every two minutes on average, between 6:30 a.m. until after 5:00 p.m. during the week. Truck traffic diminishes during the weekend but Quarry trucks still utilize the roads on those days. The road is narrow, so trucks must pull over to permit other trucks to pass, thereby impairing travel on the road. A city employee testified that the city receives more complaints about Quarry trucks than any other issue. Residents and business owners who own property near the road testified that the dust and noise prevents them from enjoying their property or operating their businesses as they would wish. The jury could conclude from the evidence that the Appellants' use of Second Avenue was so extensive and of such duration as to constitute a substantial interference.

The jury heard evidence that the constant heavy use of Second Avenue has caused the road to fail. Notably, the northbound lanes have sustained significantly more damage than the southbound lanes, from which the jury could conclude that the road failure was due to the heavily laden trucks from the Quarry that use the northbound lanes and not from regular vehicular traffic. Greenwood provided further evidence that the abuse and ineffective repair of Second Avenue has resulted in significant safety issues for travelers who would otherwise use the road. Repeated overlays have led to dangerous drop offs along the edge of the narrow road and the

road has developed swales and ruts that can cause vehicles to "bottom out" along certain stretches. The jury heard testimony that children could not ride their bikes near Second Avenue or even wait for a school bus near the street because of the danger posed by the high volume of heavy truck traffic. From this evidence, the jury could conclude that the Appellants' unreasonable use of the road substantially interfered with public safety.

Greenwood's failure to provide objective evidence such as emissions studies does not prevent the city from providing sufficient evidence of a substantial interference. The primary focus in a nuisance inquiry is whether the defendant's activities unreasonably interfered with the community's use and enjoyment of their land or a community asset, such as, here, a public road. ***See Rynchnovsky v. Cole*, 119 S.W.3d 204, 209-10 (Mo. App. 2003).** The citizens' testimony as to how the excessive dust, noise, and fumes interfere with the use and enjoyment of their property and the operation of their businesses is consistent with such an inquiry. Nor does the lack of evidence about vehicular accidents on Second Avenue necessarily imply that the road is safe. Rather, the jury could conclude from the evidence that the absence of accidents was more a result of the reduced speed limits and the reluctance of Greenwood residents to use the road.

Greenwood provided sufficient evidence to support an inference that the Appellants' use of Second Avenue was unreasonable and created a substantial interference such that the public's right to safety and to the community's right to use and enjoy their property had been substantially impaired. Point denied.

Martin Marietta and Hunt Martin[5] next argue that Greenwood failed to demonstrate that the truck drivers were agents of the Quarry, sufficient to establish the Appellants' responsibility for any nuisance created by the trucks. Appellants contend that Greenwood failed to show that the Quarry controlled or directed the work done by the trucks. Appellants argued that the truck drivers were independent contractors and that the Quarry could not be held responsible for their actions. The trial court concluded that Greenwood provided sufficient evidence of control to submit the question to the jury. Appellants requested and received, over Greenwood's objections, that a scope of agency instruction be submitted to the jury.

Whether an individual is an agent or an independent contractor frequently turns on the issue of control. ***See Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303, 308 (Mo. App. 2003).** Generally, where one person contracts with another, "exercising an independent calling to do a work for him, according to the contractor's own methods, and not subject to his control or orders except as to results to be obtained, the former is not liable for the wrongful acts of such contractor or his servants." ***Long v. Moon*, 17 S.W. 810, 811 (Mo. 1891)** (internal citations and quotations omitted). In nuisance, the primary focus is on whether the defendants controlled the instrumentality of the nuisance. ***Rosenfeld*, 28 S.W.3d at 452.** Here, that focus would be on whether the Quarry controlled the trucks, or, more specifically, whether Greenwood provided sufficient evidence from which the jury could conclude that the Quarry controlled and directed the trucks such that, under these facts, the Quarry controlled the instrumentality of the nuisance.

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[5] This claim is raised in Point V of Martin Marietta's brief and in Point II of Hunt Martin's brief.

Greenwood provided evidence that Appellants contract with Pavlich, a trucking firm, to haul their rock to the customers and that the rate the trucking company charge is reflected in the distance the trucks must travel. A Quarry employee testified that they repaired Second Avenue when their truckers complained, stating that the road "was affecting *our trucks* that *we hired* to haul the material out of the Quarry." (Emphasis added.) Greenwood provided evidence that the Quarry controlled when trucks could come into the Quarry, how much they could haul, and when the trucks could begin running in the morning and when they would stop running at the end of the day. A Quarry employee admitted they could control which trucks did business with the Quarry, and if a truck driver acted improperly they could implement a "one strike rule." There was also testimony that at one time the Quarry employed a dispatcher, evidence from which the jury could conclude that Quarry would not need a dispatcher unless it sought to exercise some kind of control over the trucks. Even more importantly, the jury heard evidence that the Appellants took steps to keep Second Avenue open when the city first sought to restrict access by filing the initial lawsuit in federal court.

This court cannot conclude that the trial court erred in submitting the issue of agency, at Appellant's request, to the jury. Greenwood raised sufficient question of the Quarry's control over the trucks to submit the issue to the jury.

The holding here is consistent with the courts of other states that have addressed issues and fact patterns very similar to those raised in this case. This court notes that in these cases a public nuisance was found on facts substantially more favorable to the defendants.

In ***Hall v. North Montgomery Materials*, No. 2060946, 2008 WL 2410239 (Ala. Civ. App. June 13, 2008)**, the Alabama Court of Civil Appeals

declared a proposed granite mine to be a public nuisance, concluding that "one inevitable consequence of its operation will be defective and dangerous roads." ***Id.*** **at *18.** The mine could be accessed by three different routes over which trucks, driven by independent truckers, would haul the proposed 450,000 tons of gravel per year. ***Id.*** **at *2.** All access routes required trucks to travel through a residential area. ***Id.*** **at *1.** The roads were paved country roads, or farm-to-market roads, twenty-one feet wide or less with little or no shoulders. ***Id.*** **at *2.** The court noted that the roads were not designed to carry heavy loads. ***Id.*** Under the proposed production level, the court noted that during an eight hour work day, sixty trucks would enter and leave the mine at a rate of one every five minutes. ***Id.*** The court concluded that "the evidence indicated that there would be a fundamental alteration in quantity and quality of traffic on the three roads" once the mine opened. ***Id.*** **at *12.** The heavy use of these three roads would "endanger the motoring public and damage the roads." ***Id.*** **at *13.** The court reasoned that "if, in its usual operation, a business routinely places oversized vehicles on a narrow road that impeded passing and unduly increases of accidents . . . the business should be considered a nuisance." ***Id.*** **at *14.** The court found that the mining operation was "a public nuisance by reason of the fact that one inevitable consequence of its operation will be defective and dangerous roads." ***Id.*** **at *18.**

In ***West v. National Mines Corp.*****, 285 S.E.2d 670 (W. Va. 1981),** property owners whose property abutted a public road along which independent contractors hauled coal between a mine and a processing facility brought suit contending the dust created by the trucks was a nuisance. ***Id.*** **at 673.** The trial court denied the property owner's motion for an injunction and dismissed the suit. ***Id.*** **at 672.** In reversing the trial court's judgment, the appellate court noted that the coal trucks carried between thirty and fifty tons per load and ran six days per

week. ***Id.*** **at 673.** The court noted, additionally, that the production of coal had escalated in recent years, increasing the amount of truck traffic on the road. ***Id.*** The plaintiffs testified that the dust required them to live with their doors and windows closed and that the dust interfered with their breathing and prevented them from raising a garden. ***Id.*** **at 673.** The circuit court held that the trucks were operated by independent contractors and that none of the mining company employees could be held liable "because the dust problem was created by their use of a *public* road." ***Id.*** **at 674.** The appellate court reversed the trial court's judgment. ***Id.*** **at 679.** The court found that "the use and enjoyment of a public roadway . . . must be exercised in a reasonable manner and with due regard for the right adjoining property owners to the use and enjoyment of their property." ***Id.*** **at 677.** The court noted, further, that "[i]t is a well established principle of law that one who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve the creation of a public or private nuisance, is subject to liability for harm resulting to others from such nuisance." ***Id.*** **(*citing* Restatement (Second) of Torts § 427 B (1965)).** The court agreed with the plaintiff's argument that "a party cannot escape liability for a nuisance created by its operations by contracting with others to perform the objectionable segments of its operations." ***Id.***

In the above cases, the courts found that potential damage to roads similar to Second Avenue and the dust created by trucks, similar to that created along Second Avenue, sufficient to find a nuisance created by quarry or mine truck traffic. The analysis of the facts and the application to nuisance are persuasive and consistent with the result found here.

The trial court did not err in submitting the nuisance issue to the jury. Point denied.

B. Negligence

Appellants raise several points of error challenging the admissibility of Greenwood's negligence claim. However, the peculiar nature of the verdict director, submitted and requested by Appellants, raises a question as to whether any claimed error associated with negligence need be addressed.

Three counts were submitted to the jury and the jury returned a verdict for Greenwood on two counts, negligence and nuisance, finding in favor of the defendants on the trespass count. Negligence was submitted to the jury in Instruction 6 through Instruction 19. The damages instruction for negligence, Instruction 16, stated: "If you find in favor of plaintiff then you must award plaintiff such sum as you may find from the evidence to be the *reasonable cost of repair of any damage to Second Avenue*." (Emphasis added.) Instruction 20 through Instruction 31 concerned Greenwood's nuisance claim. The damages instruction for nuisance, Instruction 29, was virtually identical to that of Instruction 16: "If you find in favor of the City of Greenwood, then you must award the City of Greenwood such sum as you may find from the evidence that will *fairly and justly compensate* The City of Greenwood *for the cost to repair Second Avenue*." (Emphasis added.)

Plaintiffs requested that a damage instruction be included in the instructions for each count. Defendants expressed concern that Greenwood could sustain multiple recoveries under such a scheme. As the measure of compensatory damages was the same for all three counts, the jury could award Greenwood the cost to repair the road as many as three times. Defendants proposed verdict form B asked the jury to return a verdict on each count against each defendant. After the matrix of verdicts, the form had one line for damages: "We, the undersigned

jurors, assess the damages of Plaintiff Greenwood at $ _____ (stating the amount, or, if none, write the word 'none')." Greenwood proposed that if the inclusion of a damage instruction in each count resulted in multiple recoveries, the trial court could "solve it afterwards . . . in amended evidence." When the trial court expressed reluctance to follow this procedure, Greenwood conceded, stating: "We'll give them what they want."

Given the nature of the damages pleaded and Appellant's verdict form, to be awarded the full measure of damages at trial, the cost to repair the road, Greenwood need only prevail on one count. Greenwood prevailed on negligence and nuisance and, in the single damages line, was awarded compensatory damages of $1.9 million. Martin Marietta and Hunt Martin appealed both nuisance and negligence.

On appeal, as at trial, Greenwood only needed to prevail on one count to receive the full measure of compensatory damages. This court has reviewed Appellants' claims as to nuisance and has determined that nuisance was both properly plead and properly submitted to the jury. Greenwood prevails on the nuisance count; this court need not address Appellants' challenge to the verdict on negligence because such an analysis would have no practical effect on the outcome. Accordingly, this court need not and will not address Martin Marietta's Points I, II, and III, and Hunt Martin's Point I, all challenging the submissibility of the negligence claim.

C. Declaratory Judgment

In Point VII, Martin Marietta argues that the trial court's declaratory judgment in favor of Greenwood, finding the city's ordinance was valid and enforceable pursuant to Missouri, law was contrary

to Missouri law because the ordinance closed every street in the city to through truck traffic and prevented access to state highways.

The grant of a declaratory judgment is reviewed under the same standard as a court-tried case. ***Andresen v. Bd. of Regents of Mo. W. State Coll.*, 58 S.W.3d 581, 585 (Mo. App. 2001).** This court will affirm the trial court's judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." ***Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).** Statutory interpretation is a question of law subject to *de novo* review. ***Lindquist v. Mid America Orthopaedic Surgery, Inc.*, 224 S.W.3d 593, 594-95 (Mo. banc 2007).**

Greenwood's Ordinance No. 2007-02-01-02 added Section 397.065 to Greenwood City Code. The Sections provides that "[c]ommercial vehicles, except local trucks making deliveries to and from residents thereon of goods, wares, merchandise and household deliveries, including household moving trucks, shall only operate on routes designated as a "Commercial Use Route" pursuant to Section 395.070." Martin Marietta points out that Greenwood has not designated any city street as a Commercial Use Route.

Martin Marietta first argues that the ordinance is invalid under Missouri law. Martin Marietta argues that Sections 304.170 and 304.180[6] create a "10 mile rule" that permits trucks meeting the maximum length, width, height, and weight specifications to travel Missouri highways. Martin Marietta contends that the statutory language permits such trucks to

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[6] All statutory references are to RSMo Cum. Supp. 2005 unless otherwise specified.

operate on the "state highway system (defined at § 304.001(13), *and within ten miles of these statutorily defined systems*." Martin Marietta argues that Greenwood city streets lie within "the ten-mile operating area adjoining the state highway system as made available under section 304.170." Consequently, they contend, Greenwood cannot restrict access to streets within this ten-mile buffer because the city cannot limit access to the state highway system.

Martin Marietta does not provide any legal support for a "10 mile rule" allegedly created by Section 304.170. Indeed, the specific statutory language of Section 304.170.10 states that trucks meeting these specifications "may be operated at a distance not to exceed ten miles from the interstate system." This language does not create a ten mile buffer around the state highway systems in which municipalities lose the ability to regulate their streets,[7] but, rather, the statute limits the reach of the Section 304.170. Indeed, Section 304.120 expressly grants municipalities the authority to regulate and restrict access to its roads. Section 304.120.2(4) provides: "Municipalities, by ordinance, may: . . . Limit the use of certain designated streets and boulevards to passenger vehicles." This court declines to interpret Section 304.170 as creating "10 mile rule" that would limit Greenwood's ability to regulate access to its city streets in direct conflict with such authority accorded in Section 304.120.

Martin Marietta's next argues that "highway," as defined in Section 301 creates an "expansive statutory definition . . . [extending] the broad access to state highways granted by statute . . . all the way

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[7] Taken to its logical conclusion, Martin Marietta's argument would vest control of all streets in a ten-mile buffer zone around the state highway system in a state agency rather than the cities through which the highways past.

to a municipal alley." This chapter defines "highway" as "any public thoroughfare for vehicles, including state roads, county roads, and public streets, avenues, boulevards, parkways or alleys in any municipality" Section 301.010(19). However, the term "highway" as defined in Section 301.010 is used "in its popular rather than its technical sense and is synonymous with 'road,' which is an open way of public passage for vehicles, persons, and animals." ***Covert v. Fisher*, 151 S.W.3d 70, 74 (Mo. App. 2004)** (internal citations and quotations omitted). Consistent with this interpretation, this definition of highway, or road, does not implicate any statutory intent to provide unlimited access through city streets to a state highway.

Martin Marietta next argues that while Section 304.120.2(4) permits municipalities to regulate the use of streets, the statute does not permit the wholesale closing of city streets to through traffic. Inexplicably, Martin Marietta argues that to limit access to passenger vehicles does not authorize the city to prohibit through trucks. However, to only allow access to a certain population necessarily means that other populations are prohibited. If the Section 304.120.2(4) permits the city to limit access to passenger vehicles, the statute, by logical extension, equally permits Greenwood to prohibit through trucks or limit such trucks to designated routes.

This interpretation is consistent with the holding in ***City of Richmond Heights v. Shackleford*, 446 S.W.2d 179 (Mo. App. 1969)**, in which the court held that Section 304.120.2(4) grants "authority . . . to ban all commercial vehicles on these streets. . . . The city has full power to forbid all vehicles but it chooses to exercise only part of this power." ***Id.* at 181.** Martin Marietta argues that ***Richmond Heights*** is inapplicable because, in that case, the city "left other access to state highways open." But, as Greenwood points out, the Greenwood ordinance did not foreclose all state highway access. Indeed,

that other access route for Quarry trucks was unaffected by the ordinance, as was highway access for trucks using State Highways RA and BB. This access, however, did not proceed through Greenwood streets, but rather accessed Highway 291 south of Greenwood. As Greenwood points out, the ordinance did not prevent Quarry trucks from accessing the state highway system, just foreclosed the most profitable route.

Martin Marietta next argues that the ordinance is unconstitutional, in violation of article IV, section 29 of the Missouri Constitution, which grants authority to regulate access to and from state highway to the highways and transportation commission. Martin Marietta notes that State Highway 150 passes through Greenwood and is denominated Main Street as it does so. Martin Marietta contends that the ordinance limited access from State Highway 150 to State Highways RA and BB. As noted above, however, the ordinance did not foreclose all access, as Highway 291 provides access these three highways and, therefore, does not implicate article IV, section 29 and the powers granted the state highways and transportation commission.

The trial court did not err in finding that Ordinance No. 2007-02-01-02 valid and enforceable under Missouri law. Point denied.

D. Compulsory Counterclaim

In Point VIII, Martin Marietta asserts that Greenwood's tort claims were compulsory counterclaims to their federal action and could not be brought separately in state court. Appellants filed the federal action in August of 2006, alleging breach of contract and violations of the Commerce Clause and challenged the city's right to close the street to through trucks under both federal and state theories. Appellants argue that the torts claims

arose from the same transaction as the federal action and, therefore, should have been brought as compulsory counterclaims.

A counterclaim is compulsory if the claim both exists at the time of service and "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a)(1)(A). The Eight Circuit has identified varying tests to determine whether a claim is compulsory:

> (1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
>
> (2) Would *res judicata* bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> (3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
>
> (4) Is there any logical relation between the claim and the counterclaim?

***Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 264 (8th Cir. 1979) (*quoting* Wright & Miller, Federal Practice and Procedure § 1419 at 42) (internal footnotes omitted).** Appellants contend that the "logical relationship test" is applicable here in that both actions implicate the same questions of fact.

Appellants' federal action, however, involved the interpretation of a contract and questions of federal law related to the Commerce Clause. The tort claims brought in state court do not relate to the same questions of law or fact, do not implicate the same evidence, and would not be barred by *res judicata* by resolution of the federal action. The identity of the parties and the Quarry's practice of dispatching trucks through Greenwood are the only logical relationships between the two actions.

Even were these logical relationships sufficiently controlling here, it does not follow that the separate claims logically belong together. Appellants attempted to remove the instant action to federal court but the federal court remanded the question of whether the ordinance violated state law, the best proposition of logical overlap sustainable by the Appellants. Appellants now attempt to assert a more attenuated connection between a state law question not related to the ordinance and the federal action. This court concludes that the question of whether the Quarry's practice of dispatching trucks through Greenwood or whether the Quarry's repair and use of Second Avenue constituted negligence and nuisance are not logically related to the breach of contract and Commerce Clause claims. The nuisance and negligence claims did not arise out of the same transaction or occurrence such that they could only be brought as compulsory counterclaims in the federal action. Point denied.

E. Punitive Damages

In Point IX, Martin Marietta contends that Greenwood's petition failed to state a claim for punitive damages. Martin Marietta contends that Greenwood failed to plead punitive damages because the city only asked for punitive damages in the prayer and did not aver any facts that demonstrated "a complete indifference to or conscious disregard for the safety of others."

Where the appellant contends that the petition fails to state a claim upon which relief can be granted, this court reviews the petition "in almost an academic manner." ***Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993).** "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable

inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive." ***Id.*** **(citation omitted).**

Punitive damages must be both plead and proved. ***Benson v. Jim Maddox Nw. Imports, Inc.*****, 728 S.W.2d 668, 669 (Mo. App. 1987).** The request for punitive damages need not be plead in a separate count, ***Brown v. Payne*****, 264 S.W.2d 341, 345 (Mo. 1954)**, but "it must nevertheless appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damages was done maliciously or was the result of the willful misconduct of the defendant or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them, at least where the wrongful act does not in itself imply malice." ***Bower v. Hog Builders, Inc.*****, 461 S.W.2d 784, 798 (Mo. 1970) (internal quotation marks omitted).** Legal malice is not actual malice, but rather, the act was done intentionally and without just cause or excuse. ***Id.*** To state a claim for punitive damages, the pleadings must "allege facts indicating the defendant maliciously, willfully, intentionally, or recklessly injured the plaintiff by his tortious act." ***Dyer v. Gen. Am. Life Ins. Co.*****, 541 S.W.2d 702, 706 (Mo. App. 1976).**

Greenwood's petition asked for punitive damages and asserted that the Quarry sent a "high volume of truck traffic" through city streets. The city asserted that such use was unreasonable in that the "truck traffic annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights of property of the whole community." The petition states that Greenwood passed the ordinance because the city had a "genuine concern for the safety of homeowners, children, and pedestrians" but that the defendants filed suit in federal court seeking to enjoin that ordinance and keep Second Avenue open for trucks. The petition stated further, that the defendants made repairs to Second Avenue without obtaining permits or approval, that the repairs were defective

and unsafe, that the damage from such repairs were foreseeable, that the defendants continued to utilize the unsafe repairs, and that the defendants refused to pay for the damage to the road.

Liberally granting Greenwood all favorable inferences from its pleading, the petition provided sufficient facts to demonstrate that the wrongful acts complained of were done intentionally, purposefully, or recklessly. These facts, "coupled with the allegation that such entitled plaintiffs to punitive damages, fairly informed defendant of the nature of the demand "although it would have been preferable to have been more specific." ***Bower*, 461 S.W.2d at 798.** "It was not necessary [under these circumstances] to plead that the acts were done with malice or maliciously since those words are equivalent in definition to wrongful acts intentionally done without just cause or excuse." ***Id.* at 798-99.** Point denied.

Martin Marietta next contends that Greenwood failed to make a submissible case for punitive damages, arguing that Greenwood failed to demonstrate that the Appellants acted with an "evil mind." "Whether there is sufficient evidence for an award of punitive damages is a question of law." ***Perkins v. Dean Mach. Co.*, 132 S.W.3d 295, 299 (Mo. App. 2004).** This court reviews the record in a light most favorable to submissibility to determine whether, as a matter of law, the evidence was sufficient to submit the claim for punitive damages. ***Id.*** "A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity-that is, that it was highly probable-that the defendant's conduct was outrageous because of evil motive or reckless indifference." ***Id.* (internal quotation marks omitted).** Whether or not an award of punitive damages is appropriate depends on the facts of a particular case but may be found where the facts demonstrate that the defendants engaged in a

"willful or continual perpetration of tortious activity." ***State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. banc 1980).**

As the analysis of submissibility was limited to the nuisance claim, this court will likewise limits its analysis of the submissibility of punitive damages to the nuisance allegations. "To recover punitive damages in a nuisance action, a plaintiff must show that the defendant knowingly and willfully maintained the nuisance." ***Vermillion v. Pioneer Gun Club*, 918 S.W.2d 827, 833 (Mo. App. 1996).** Punitive damages are recoverable where the plaintiff shows by clear and convincing evidence that the defendant engaged in "'a wrongful act intentionally without just cause or excuse.'" ***Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752, 757 (Mo. 1968) (*quoting* MAI 16.01).**

Greenwood presented evidence that the excessive truck traffic not only interfered with the residents' ability to enjoy their property because of dust, fumes, and noise, but created a safety issue, not only for vehicular traffic on Second Avenue, given the failed state of the road and the dangers posed by the repeated defective repairs, but also for children living along the route. Greenwood presented evidence that the road was not designed or intended for that level of heavy traffic, and despite the inadequate nature of the road and the road's failure, the Quarry continued to dispatch a heavy volume of trucks up the route.

Moreover, the evidence demonstrated that the Appellants were aware of the citizen complaints and problems with the road but had not taken any steps, beyond repairing the road, and then only when their truckers complained, to abate the nuisance. Citizens complained of the dust, noise, and fumes as well as the condition of the road. William Gahan, the Midwest Division President of Martin Marietta, testified by deposition that he did not take any steps to address the "concerns that citizens of Greenwood

raised concerning truck traffic." Darrell Carlyle, the Greenwood city administrator, testified that citizens complained about truck traffic more than any other issue. He testified that he had called the Quarry regarding the truck traffic issues but that the Quarry had never returned his phone calls. Despite the complaints, the Quarry acted to ensure the road would remain open to trucks. A Quarry representative testified that the Quarry lost $2 million in profits when it could not run its trucks through Greenwood.

From the evidence, the jury could have concluded that the Appellants knew that their practice of dispatching trucks through Greenwood was causing Second Avenue to degrade, and that the Appellants knew that the high volume of truck traffic created a substantial interference with the rights of Greenwood citizens to enjoy their property and safely use the roads, but, nevertheless, continued to direct truck traffic through the town because that was the most profitable route. The evidence was sufficient to support Greenwood's claim that the Appellants willfully, intentionally, and knowingly maintained a nuisance with reckless disregard for the safety of Greenwood residents, both those that lived along the route and those who were forced to use a failed road.

Appellants do not contest the measure of damages but rather limit their claims to the sufficiency of the pleading and the submissibility of punitive damages. Accordingly, this court finds that Greenwood plead and proved punitive damages sufficient to sustain the submission of such damages. The trial court did not err in denying Appellants' motions for directed verdict and judgment notwithstanding the verdict. Point denied.

F. Post-Judgment Interest

In Point XI, Martin Marietta contends that the trial court applied the wrong post-judgment interest rate. By statute, the post-judgment interest rate is five percentage points above the Federal Funds Rate on the date the judgment is entered. Section 408.040.02. On June 16, 2008, the date the judgment was entered, the Federal Funds Rate was two percent. Accordingly, Martin Marietta argues, the applicable post-judgment interest rate was seven percent. The trial court assigned a nine percent interest rate in violation of Section 408.040. Greenwood concedes this point and agrees that the applicable interest rate was seven percent.

The judgment is remanded to the trial court for calculation and entry of post-judgment interest at seven percent.

IV. Conclusion

This court finds that the trial court did not err in denying Appellant's motions for directed verdict and judgment notwithstanding the verdict as Greenwood sufficiently plead and proved nuisance and punitive damages. Further, the trial court's declaratory judgment that the ordinance was valid and enforceable under Missouri law was not error. Greenwood's tort claims were not compulsory counterclaims in Appellants' federal action.

The judgment is affirmed in all aspects except as to that portion dealing with post-judgment interest. The case is remanded to the trial court for calculation of judgment on post-judgment interest

and entry of the amount of post-judgment interest as directed by this opinion.

_____

Harold L. Lowenstein, Judge

All Concur.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION, DATED JUNE 26, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

MARTIN MARIETTA MATERIALS, INC. et al.,	)	
Plaintiffs,	)	
v.	)	No. 06-0697-CV-W-DW
THE CITY OF GREENWOOD, MISSOURI,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiffs' Amended Motion for a Temporary Restraining Order and Preliminary Injunction. (Doc. 102). The parties fully briefed the issue and the Court held a hearing on April 19, 2007. Defendant then submitted additional evidence for the record.

I. Factual and Procedural Background

Plaintiff Martin Marietta Materials is the owner of a rock quarry situated outside of Defendant City of Greenwood. Hunt Martin currently manages the rock quarry. There is a Northern and a Southern route of access to Defendant's quarry. The Northern Route employs Defendant's streets, including Second Avenue. Plaintiff presented evidence that the Northern route is the preferred route since it is shorter and safer than the Southern Route.

In 1991, the parties entered into a contract regarding Plaintiff's route through the City of Greenwood (the "City of Greenwood Contract"). Defendant agreed that it "intends in good faith to continue to designate Second Avenue as a 'Commercial Use Route.' " Defendant was allowed, however, to "take[ ] any lawful and reasonable actions necessary to protect the City's financial integrity" if the "cost of maintaining Second Avenue becomes an undue financial burden to the City in the future and no reasonable financial alternative is then available to the City."

In June 2006, Defendant voted to repeal the designation of Second Avenue as a Commercial Truck Route and enacted a new ordinance barring trucks weighing over fifteen tons from using numerous streets, including Second Avenue. Plaintiff Martin Marietta filed suit in federal court on August 23, 2006. Plaintiff then filed a Motion for Temporary Restraining Order and Preliminary Injunction on September 7, 2006. The Court denied the Motion for a Temporary Restraining Order and held argument on the Preliminary Injunction Motion. On January 22, 2007, this Court ordered that Hunt Martin was a necessary party on every claim except the declaratory judgment claim. Plaintiffs filed their Amended Complaint on February 26, 2007, including Plaintiff Hunt Martin Materials, LLC as a party.

On January 26, 2007, the Court granted partial summary judgment on the declaratory judgment claim in Plaintiff's favor and struck down the City of Greenwood's weight ordinance, City of Greenwood Ordinance No. 2006-06-26-02. Since the Ordinance Plaintiff sought to enjoin was stricken, the Court denied Plaintiff's Motion for Preliminary Injunction as moot on January 31, 2007.

The City Council met on February 1, 2007 and enacted City of Greenwood Ordinance No. 2007-02-01-02, "the New Ordinance." Greenwood's New Ordinance states that "commercial vehicles, except local trucks making deliveries to and from residents ...., shall only operate on routes designated as a 'Commercial Use Route' pursuant to 395.070." Missouri Highway 150 is allegedly the only designated Commercial Use Route in the City of Greenwood. This means there is no North-South route running through Greenwood.

II. Legal Analysis

In determining whether a preliminary injunction is proper, the Court must consider "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between the harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest." Dataphase Sys. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir.1981).

A. Probability of Success on the Merits

The Court finds that Plaintiffs have shown a likelihood of success on the following claims: Breach of Contract; Violation of the Contract Clause; and Violation of the Commerce Clause.

1. Breach of Contract

To find a breach of contract under Missouri law, Plaintiffs must show: (1) a valid contract exists; (2) the rights and obligations of each party; (3) a breach; and (4) damages. Emerald Pointe, L.L.C. v. Jonak, 202 S.W.3d 652, 664 (Mo. Ct. App. 2006). Plaintiffs have shown that the 1991 Contract is a valid contract between the two parties. In return for Plaintiffs' payment of the expenses the City incurred for replacing the Second Avenue Culvert with a new structure, Defendant agreed "in good faith to continue to designate Second Avenue as a 'Commercial Use Route.' "

The Contract, however, contains a conditional termination clause. Defendant's good faith obligation continues until "the cost of maintaining Second Avenue becomes an undue financial burden to the City in the future and no reasonable fiscal alternative is then available to the City." Upon that occurrence, the City is permitted to take "any lawful and reasonable actions necessary to protect the City's financial integrity."

The conditional termination clause has not been activated in this case. Defendant has not shown that "no reasonable fiscal alternative" is available. There is little evidence that Defendant considered other reasonable alternatives prior to terminating its contractual obligations.

Further, Defendant had a duty to act in good faith in their interactions with Plaintiffs. The Court finds that Defendant's conduct in terminating the contract violated the good faith requirement. Klonoski v. Cardiovascular Consultants of Cape Girardeau, Inc., 171 S.W.3d 70, 74 (Mo. Ct. App. 2005) ("Missouri law implies a covenant of good faith and fair dealing in every contract. When a party, in bad faith, utilizes contract language that allows unilateral action to improperly deny the other party from expected

benefits flowing from the contract, he breaches this covenant.").

2. Violation of the Contract Clause

Plaintiffs have also shown a likelihood of success on the merits of their Violation of the Contract Clause claim. Article I, Section 10 of the Constitution provides that "No state shall . . . pass any . . . law impairing the Obligation of Contracts." Determining whether a violation of the contract clause exists is a two-part test. The Court determines if "(1) the state law operates as a substantial impairment upon a contractual relationship, and (2) the state cannot demonstrate a significant and legitimate public purpose behind the regulation." Western Nat'l Mut. Ins. Co. v. Lennes (In re Workers' Compensation Refund), 46 F.3d 813, 817 (8th Cir. 1995). In analyzing whether there is a substantial impairment, under the first section, the Court considers: "(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?" Koster v. City of Davenport, 183 F.3d 762, 766 (8th Cir. 1999) (citations omitted).

The Supreme Court, however, has utilized a higher standard where government impairs its own contractual obligations. Katz v. Sherman, 2006 U.S. Dist. LEXIS 27506 (W.D. Mo. 2006). Rather than the ordinarily deferential view, under those circumstances, the Supreme Court struck down a law that was "neither necessary to achievement" of the government goals "nor reasonable in light of the circumstances." United States Trust Co. v. New Jersey, 431 U.S. 1, 31 (U.S. 1977).

City Code section 395.065 violates the Contracts Clause. The 1991 City of Greenwood Contract established a clear contractual relationship. A

substantial impairment exists since Defendant's zoning changes stand in complete odds with the contract's requirements and the parties' expectations. In re Workers' Compensation Refund, 46 F.3d at 819 (In determining whether an impairment is substantial, Courts consider the "extent to which the...[parties'] reasonable contract expectations have been disrupted.").

Defendant's Ordinance is not necessary to its stated goal of road safety. While the regulation of street safety is a legitimate purpose, many alternative measure could be taken to reduce the speed and frequency of the trucks. Further, there is testimony to show that the City's purpose was to terminate its relationship with Plaintiffs and rid their streets of Plaintiffs' customers' trucks.

3. Violation of the Commerce Clause

Plaintiffs allege that the New Ordinance violates the Dormant Commerce Clause. The Constitution grants Congress the power to regulate commerce among the states. Courts recognize, however, that Congress's regulatory power extends beyond areas where Congress has affirmatively acted. Indeed, Courts have held that "a 'dormant implication of the Commerce Clause prohibits state ... regulation ... that discriminates against or unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.' " *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002) (citations omitted).

To determine whether the law violates the dormant commerce clause, the Court must consider whether the law creates differential treatment for in-state versus out-of-state economic interests. Id. Where the law does not so differentiate, the law may still violate the commerce clause if "the burden imposed on such commerce is clearly excessive in

relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (U.S. 1970).

Defendant's Ordinance essentially prohibits truck-traffic moving from either the North or the South from coming through the City of Greenwood. Such an extreme limitation on the movement of interstate commerce is clearly excessive in relation to the claimed local benefit of road safety. Indeed, the City has made no concessions to aid the movement of interstate traffic through or around their City. Accordingly, this Court finds that Plaintiffs have shown a likelihood of success on the merits as to their Violation of the Commerce Clause claim.

B. Threat of Irreparable Harm to the Movant

While economic loss alone is insufficient for irreparable harm, Plaintiffs have shown actual irrecoverable economic loss which are sufficient to establish irreparable harm. Iowa Utils. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996). The evidence shows that the New Ordinance cost Plaintiffs an incalculable loss of revenue and good will. Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 866-867 (8th Cir. 1977); Iowa Utils. Bd. v. FCC, 109 F.3d at 426.

Many of Plaintiffs' monetary losses would be difficult to track and calculate. The nature of the quarry business is seasonal and based on narrow margins. Plaintiffs presented testimony that it is impossible for them to ascertain which potential customers and contracts have gone to other quarries. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 20 (1st Cir. 1996) (upholding finding of irreparable harm where it could "never be shown how many [customers] opted not to associate themselves with [Defendant]...and it would follow inexorably that neither the adverse impact on sales

nor the concomitant insult to goodwill could be measured accurately.").

Plaintiffs also suffer an incalculable loss of goodwill. Planned Parenthood of Minnesota, 558 F.2d at 866-867. Under the current regime, Plaintiffs' customers must utilize the BB Highway Southern Route. Testimony showed that this route is more dangerous and in worse repair than Second Avenue. Plaintiffs' customers perception of the ease of interactions and general dealing with Plaintiffs is being negative impacted by the experience. It only grows worse with the closure of Highway 150. Customers are then forced to travel an additional seven miles. It is impossible for Plaintiffs to quantify the loss of goodwill nor could Plaintiffs recapture this loss with future market efforts.

C. Balance of the Harms

In addition to the two factors above, the Court must also "balance between the harm and the injury that granting the injunction will inflict on other interested parties..." Dataphase Sys. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981).

The Court is fully cognizant of, and sympathetic for, the harms Defendant may suffer upon the grant of this injunction. Approximately 600 trucks a day, a truck a minute, utilize Second Avenue. City of Greenwood is not a large city thus making the truck presence even more acute.[1]

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[1] Defendant did not present any evidence of bodily injury or serious property damage throughout the entire history between the parties. If the truck traffic raises to the level that this becomes an actual harm, the Court will entertain a Motion for Reconsideration as to the Preliminary Injunction.

This damage, however, is not as large as the damage Plaintiffs currently suffer. Plaintiffs rock quarry loses customers, profits and goodwill everyday. Plaintiffs' employees future employment turns on the outcome of this lawsuit. Plaintiffs had a reasonable expectation in their contract rights. Allowing Defendant to act contrary to those rights undermines the reasonable expectations of these parties, and, consequently, other contracting parties.

Finally, Defendant's traffic restrictions work a burden on persons other than Plaintiff. Currently there is no North-South commercial route running through the City of Greenwood. Anyone wishing to move interstate commerce in this direction is so restricted. The Court has received testimony from other such business owners. Accordingly, the balance of the interests weighs in Plaintiffs' favor.

D. Public Interest

The public is best served in the enforcement of contracts entered into by governmental authorities. State and local governments are important actors in the free market economy and the public must be able to rely on their contracts as they do any private citizen or entity.

While there is an important public interest in the development and enforcement of local regulations, particularly traffic regulations, those regulations must abide by the governmental entity's prior contractual obligations and federal law.

The Court recently ordered that the parties in this case enter mediation. Unfortunately, after a good-faith attempt on both sides, the mediation ended unsuccessfully. It was the sincere hope of this Court that the parties could develop a successful and mutually agreeable resolution to this matter. For the parties, with their intimate knowledge and

experience of the ever changing facts, are in the best position to develop an outcome that would best serve the public benefit. In light of the recent termination of mediation, however, the Court finds that a Preliminary Injunction is necessary in this case.

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for a Preliminary Injunction. Defendant is hereby enjoined from enforcing City Code section 395.065 and from violating the 1991 contract between Greenwood and Plaintiffs pending the final hearing and determination in this case.

III. Bond

Rule 65(c) of the Federal Rules of Civil Procedure requires the "giving of security by the applicant, in such sum as the court deems proper." The security serves a protection "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c). Given that the injunction permits Plaintiffs to use Defendant's City streets during the pendency of this lawsuit, the Court finds that Plaintiffs should post a $90,000 security to pay for any possible street repairs.

Date: June 26, 2007

/s/ Dean Whipple
Dean Whipple
United States District Judge

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION, DATED SEPTEMBER 4, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

MARTIN MARIETTA MATERIALS, INC., HUNT MARTIN MATERIALS, LLC,	)	
Plaintiffs,	)	No. 06-697-CV-W-DW
v.	)	
THE CITY OF GREENWOOD, MISSOURI,	)	
Defendant.	)	

ORDER

From June 30, 2008 through July 3, 2008, the Court held proceedings on Plaintiffs' Complaint. After a pretrial conference, the Court directed the parties to present evidence on Plaintiffs' claims as follows: 1) Count I - Breach of Contract to determine whether there were any issues to present to the jury, 2) Count II - Unconstitutional Impairment of the 1991 Contract, and 3) Count III - Violation of the Commerce Clause. Plaintiffs' Complaint seeks both

damages and injunctive relief. At the conclusion of the bench trial, the Court granted judgment in favor of Plaintiff Martin Marietta Materials on Counts I and III and in favor of Plaintiff Hunt Martin Materials on Count III. In so doing the Court granted Declaratory Judgment (Count V) and Injunctive Relief (Count IV) in favor of Plaintiffs on the respective counts. This Order constitutes the entry of judgment following the Court's oral pronouncement on July 3, 2008.

I. BACKGROUND

The circumstances giving rise to this action have been extensively set forth in the pleadings and motions filed herein. A brief summary will suffice for the purposes of this Order. Plaintiffs own and operate a quarry south of the City of Greenwood and have done so for decades.[8] Trucks have utilized what is referred to as the Second Avenue route for access to and from the quarry to reach Missouri Highway 150. In 1991, Greenwood and Martin Marietta entered into the contract that is the subject of this action (the 1991 Contract) wherein the City agreed to allow use of Second Avenue as a commercial use route if Martin Marietta would pay for a new culvert on Second Avenue. The culvert was constructed and paid for by Martin Marietta. Trucks continued to use the Second Avenue route until Greenwood passed an ordinance in the summer of 2006 that limited the weight of trucks that could use the Second Avenue route (the "First Quarry Ordinance").

On January 26, 2007, this Court declared the First Quarry Ordinance to be invalid. On February 1, 2007, Greenwood passed another Ordinance (the

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[8] Martin Marietta owns the quarry land and Hunt Martin operates the quarry. The exact distribution of the ownership interest is not relevant to the claims before the Court.

"Third Quarry Ordinance") [9] prohibiting all commercial vehicles from Greenwood streets unless designated a "Commercial Use Route." Greenwood did not designate any "Commercial Use Routes" and, therefore, trucks were unable to use the Second Avenue route to and from the quarry. Trucks were forced to use an alternate route to the south of Greenwood that added an additional 16 miles round trip. On January 30, 2007, Greenwood filed a state court action against Martin Marietta and Hunt Martin Materials seeking declaratory judgment that the Third Quarry Ordinance was enforceable under Missouri law. That action was removed to this Court, but was ultimately remanded because no federal claims were implicated on the face of the Petition. Later amendments to the Petition added claims for trespass and nuisance. Prior to trial in this matter, a jury in the state action found that the truck traffic on Second Avenue was a nuisance, Defendants had negligently repaired Second Avenue. In a bench trial, the state court judge[10] found that the Third Quarry Ordinance was valid under Missouri law.

On June 26, 2007, this Court entered a preliminary injunction against enforcement of the Third Quarry Ordinance. Trucks began using the Second Avenue route on July 1, 2007.

II. DISCUSSION

A. Judicial Estoppel

The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a

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[9] There was also a Second Quarry Ordinance "passed" on January 30, 2007. Greenwood proceeded to enact the Third Quarry Ordinance because it did not follow proper notice and meeting procedures on January 30, 2007.

[10] The Honorable Jack R. Grate, Jr.

previous proceeding. "The purpose of judicial estoppel is to protect the integrity of the judicial process 'by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" Young v. Time Warner Cable Capital, L.P., 2006 WL 2927569, *3 (W.D. Mo. 2006).

A court may invoke the doctrine at its discretion where a party's later position is "clearly inconsistent" with its earlier position, the party was successful in persuading a court to accept its earlier position, and acceptance of an inconsistent position would create "the perception that either the first or the second court was misled." New Hampshire v. Maine, 532 U.S. 742, 751 (2001).

Greenwood has argued that "the State Court Lawsuit . . . does not implicate any federal issues or defenses" and that "[t]he facts underlying this [state court] action are distinct from those at issue in the Federal Lawsuit." In favor of remand of the subsequently filed state court action, Greenwood argued that the cases are "mutually exclusive and do not meet the 'same case and controversy' requirement for supplemental jurisdiction." Greenwood was also successful in persuading the state court that its claims there had nothing to do with the federal action. These positions are inconsistent with Greenwood's current position that "the [state court] Judgment or the facts giving rise to the Judgment . . . are relevant to this case." (Doc. 289 at 3).

To protect the integrity of the judicial process, Greenwood is estopped from asserting any positions inconsistent with those previously asserted before this Court or the state court. Therefore, the Court will not consider Greenwood's arguments attacking the Contract on the grounds that it is void because of the nuisance verdict in state court action or that Martin Marietta first breached the Contract by virtue of the negligence verdict in the state court action. It is also on this basis that evidence related

to these positions was not considered by this Court at trial.

B. Count I - Breach of Contract

On Count I - Breach of Contract, the Court heard the parties' evidence and determined that no admissible evidence would create an issue for the jury. The Court finds the 1991 Contract between Martin Marietta Materials and the City of Greenwood is valid.

Greenwood argues that the Contract is invalid because a municipality cannot contract away its police power. Greenwood cites to case law indicating that a municipality may not contractually relinquish control over its functions, however, none of the cited case law is on point with the facts of this case. Here, the Contract does not significantly hinder Greenwood's power to regulate Second Avenue. The evidence presented indicates that Greenwood has actively regulated the use of Second Avenue by trucks by designating truck speed limits, prohibiting the use of "jake brakes" and retaining the right to issue citations. Further, the 1991 Contract expressly permits Greenwood to terminate its obligations thereunder if it is unable to shoulder the financial burden of keeping Second Avenue open to truck traffic. Finally, the Contract does not actually require Greenwood to keep Second Avenue open to quarry truck traffic, but rather to use good faith efforts to do so.

Greenwood also argues that the Contract is invalid because the term "quarry" is ambiguous, specifically that the term must be limited to the acreage active at the Quarry in 1991. After hearing evidence as to the terms of the 1991 Contract the Court finds that there are no issues for the jury to decide. The Court notes that the challenged term itself is not ambiguous, a quarry is simply the location from which rock or minerals are extracted. It is

undisputed that the trucks collecting aggregate from the Quarry are doing so from the same location today as in 1991. Although the acreage being mined in 1991 has been depleted and the Quarry is mining from adjacent acreage today, no evidence was presented suggesting that the amount of "active" acreage of the quarry was an issue between the parties at the time of the Contract. Further, no evidence was presented to the Court to suggest that the specific land that was the source of the rock being quarried arose as an issue under the Contract after 1991. Although there were multiple contacts between Greenwood and Plaintiffs related to requests to perform repairs on Second Avenue, Defendant offered no evidence that Greenwood approached Plaintiffs regarding the issues of truck volume, the physical location of the mined acreage, or size of the quarry operations. Based on the evidence presented, the Court finds as a matter of law that the 1991 contract does not contain any ambiguous terms.

As discussed above, Greenwood also relies on the state court negligent repairs verdict to find that Martin Marietta first breached the 1991 Contract. However, this argument relies on the existence of a duty by Martin Marietta to repair Second Avenue. No such duty is expressed within the 1991 Contract. Greenwood did not argue in state court that the repairs were a breach of the 1991 Contract, in fact, the jury in the state court action did not hear any evidence of the existence of Greenwood's agreement to use good faith efforts to keep Second Avenue open to truck traffic. Based on the evidence presented here and in state court, the Court finds that the 1991 Contract does not impose an express or implied duty to repair Second Avenue on Martin Marietta. Therefore, Greenwood's prior breach argument fails as a matter of law.

There is no dispute that Martin Marietta performed under the 1991 Contract. Evidence was presented that the Second Avenue box culvert was

constructed and Martin Marietta Materials compensated Greenwood for the cost of the culvert. Although Greenwood argues that Martin Marietta cannot establish whether it was performed to Greenwood's specifications, the Contract clearly excuses Martin Marietta from any duties related to the specification or construction of the culvert. Martin Marietta's only obligation was to compensate Greenwood for any construction that was performed consistent with the specifications found in Exhibit A to the 1991 Contract.[11]

Although the question of whether a party has breached a contract is normally reserved for the jury, the Court finds in this case that it is proper to find breach as a matter of law. Under the contract, the City of Greenwood had an obligation to use good faith to keep Second Avenue open to trucks going to and from the Greenwood Quarry. The contract clearly indicates that Greenwood was aware that availability of the Second Avenue route was critical to the commercial viability of the Quarry. For the years, between 1991 and 2005, Greenwood and the Quarry were able to resolve any issues arising with the truck traffic on Second Avenue. The evidence is undisputed that at Greenwood's request, the Plaintiffs performed various repairs on Second Avenue during this time.

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[11] Greenwood has argued repeatedly that the contract was invalid because Martin Marietta was unable to provide a copy of Exhibit A. Although Martin Marietta did eventually present a copy of Exhibit A, the Court finds Exhibit A irrelevant because it is only indirectly related to Martin Marietta's obligations under the contract. Any concerns regarding the exact specifications for the box culvert are further diminished in light of the fact that the culvert was constructed and paid for by Greenwood and Martin Marietta reimbursed Greenwood in 1992.

In 1991, Greenwood agreed to make a good faith effort to keep Second Avenue open to trucks, not to actually keep Second Avenue open. Martin Marietta argues that the passing of the various quarry ordinances and surrounding conduct constituted a breach of Greenwood's obligations under the 1991 Contract. After hearing the evidence, the Court finds that no reasonable jury could find that Greenwood's conduct constituted a good faith effort to keep Second Avenue open to truck traffic.

Greenwood primarily argues that the Quarry Ordinances were necessary to protect the health, safety and welfare of the citizens of Greenwood. Although Greenwood officials and attorneys repeated this mantra, no credible evidence was presented indicating that the truck traffic actually represents a quantifiable threat to the health, safety and welfare of the citizens of Greenwood.[12] And even assuming that this were true, there was no evidence presented that Greenwood made a good faith effort to present its concerns to Martin Marietta and to investigate alternate solutions to the problems it purported to be addressing on Second Avenue. Rather, it unilaterally acted to prohibit truck traffic to and from the Quarry on three separate occasions. In the absence of any evidence suggesting Greenwood engaged in anything but a legislative ban of quarry truck traffic, the Court finds that Greenwood breached the 1991 contract as a matter of law.

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[12] Greenwood, again, relies on the nuisance judgment in the state court action as proof that the truck traffic represented a threat to the health, safety and welfare of the citizens of Greenwood. For the reasons discussed elsewhere in this Order, Greenwood is judicially estopped from arguing any position inconsistent with their repeated stance that the state case and federal case are unrelated.

Having found a valid contract between the City of Greenwood and Martin Marietta and that Greenwood breached the terms of the contract, the issue of damages is reserved for the jury's determination.

C. Count II - Unconstitutional Impairment of the 1991 Contract

The United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. In deciding Plaintiff's claim, the Court must focus on whether the change in municipal law has "operated as a substantial impairment of a contractual relationship." General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). Contract Clause analysis involves three components: "(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?" Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Assoc., 110 F.3d 547, 551 (8th Cir. 1997) (en banc). Total destruction of a contract is a substantial impairment. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934).

At first glance, this case seems to involve total destruction of Martin Marietta's rights to keep Second Avenue open to through-truck traffic under the 1991 Contract. But this ignores the nature of the rights and reasonable expectations under the 1991 Contract. Therein, Greenwood promised to use good faith efforts to keep the Second Avenue route open to commercial through traffic, but specifically reserved the right to terminate the Contract if doing so became a financial burden to the City. It is obvious that heavy quarry truck traffic would necessitate continual maintenance on the Second Avenue route that could potentially burden the financial resources of Greenwood. Although Martin

Marietta made repairs to Second Avenue in 1994, 1995 and 1999, the 1991 Contract did not grant any right to Martin Marietta to extend its access rights indefinitely by assuming financial responsibility for Second Avenue should the City find it burdensome to do so. Furthermore, after 1991, Martin Marietta and Greenwood had multiple hearings and meetings related to alternate routes and the potential of discontinuing use of the Second Avenue route.

On this record, the Court finds that the Third Quarry Ordinance is not a substantial impairment of Martin Marietta's contract rights. The Court finds that the terms of the 1991 Contract and various events occurring between the 1991 Contract and the passing of the First Quarry Ordinance diminished Martin Marietta's reasonable expectations regarding the long-term availability of Second Avenue for quarry traffic. Cf. Energy Reserve Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) (in heavily regulated industries, parties are considered to have less reasonable expectation that legislation will not alter their contractual arrangements). Accordingly, the Court finds that these diminished expectations were not disrupted by the passage of the Quarry Ordinances.

D. Count III - Violation of the Commerce Clause

The dormant commerce clause prohibits states and municipalities from enacting laws that "discriminate against or unduly burden interstate commerce." South Dakota Farm Bureau v. Hazeltine, 340 F.3d 583, 592-93 (8th Cir. 2003). One of two frameworks is used to evaluate whether a state or local regulation violates the dormant Commerce Clause. The second framework applies here: if a law does not overtly discriminate against interstate commerce, the law will be stricken if the burden it imposes upon interstate commerce is "clearly excessive in

relation to the putative local benefits." U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1067 (8th Cir. 2000) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Those challenging the legislative action have the burden of showing that the statute's burden on interstate commerce exceeds its local benefit. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

The Ordinance at issue here prohibits all truck traffic through Greenwood that is not traveling to or from a location within the city limits. The Quarry is located to the south of Greenwood, outside the city limits, and the effect of the Ordinance is to require all trucks traveling to and from the Quarry to traverse county roads between the Quarry and the intersection of Missouri Highway 150 and Missouri Highway 291. The available alternate routes significantly increase the cost of transportation for these trucks.

For a law to survive a Commerce Clause challenge, Greenwood must produce evidence that the law actually produces the benefits it purports to produce, that is, that the putative benefits to the state are not "illusory." See U & I Sanitation, 205 F.3d at 1070-71 ("sheer speculation to suppose that the ordinance has any effect upon the risk of hazardous waste accidents."); see also R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 735 (8th Cir. 2002) (although statute requiring in-state propane retailers to maintain 18,000-gallon storage facilities was designed to protect citizens during the winter months, the actual benefit derived from the statute was minimal or non-existent.).

Greenwood alleges that the Ordinance is necessary to protect the health and safety of its citizens, especially those who reside along the Second Avenue route utilized by the trucks. Although the ultimate burden of proving the violation is Plaintiffs', at trial Greenwood was unable to produce any evidence of safety issues related to truck traffic. Notably,

Greenwood took no steps to quantify the health and safety impact of truck traffic until after the Ordinances were passed. There was no documented instances of accidents or injuries attributable to the truck traffic on the Second Avenue route. Greenwood has acted to protect its citizens by imposing various regulations on trucks traveling on Second Avenue: 25 mile per hour speed limit and no "Jake brakes." The Chief of Police testified that in his experience the trucks adhered to the imposed speed limits and that few if any citations were issued to drivers of trucks traveling to or from the Quarry. Greenwood's primary argument throughout this case has been that it should not have to wait for an accident before taking steps to protect its citizens. While this as a general statement is true, Greenwood has failed to demonstrate that the trucks traffic represents a significant risk to the health and safety of the citizens of the city, that the current regulations in effect on the Second Avenue route inadequately protect the health safety of the citizens of Greenwood, or that the Ordinance alleviates any risks to the health and safety of the citizens of the city in any quantifiable way.

The Court also notes that while Greenwood claims its action is necessary to protect the health and safety of the citizens, the Ordinance does not impact the truck traffic on Second Avenue to and from companies that are located within the city limits. One such company, Buckley Explosives, sends large trucks loaded with explosives on the Second Avenue route through Greenwood. This company is permitted to continue driving its trucks north on Second Avenue into the most densely residential portion of the Second Avenue route. It is equally clear that Greenwood's Ordinance causes the affected trucks to travel more miles over arguably more dangerous roads potentially increasing rather than decreasing overall exposure to accidents and fatalities.

The financial burden imposed upon Martin Marietta by the Greenwood Ordinance is substantial. The Court heard extensive evidence of the impact on transportation costs of adding 16 miles to the round trip of every truck traveling to and from the Quarry. The evidence suggests that the Quarry must absorb that additional cost or lose business to other quarries. Although the quantification of this impact was left to the jury, the Court has no doubt that the burden on the Quarry operations is substantial.[13]

In comparing the putative local benefit of the statute to the burden imposed on commerce, courts must also look at the cumulative effects of the challenged statute on other impacted entities. See U & I Sanitation, 205 F.3d at 1069. At trial the Court heard evidence of impact or potential impact on vendors and service providers traveling to and from the Quarry. The Court also heard evidence on the impact on Dupuis Redi-Mix Concrete, a company that is located on Second Avenue also outside the Greenwood city limits. The Court finds the Ordinance has substantial impact on other entities relying on truck traffic through Greenwood.

In addition to the cumulative effects of the Greenwood Ordinance, the Court must consider the "interstate effect on the market if several jurisdictions were to adopt similar [ordinances]." U & I Sanitation, 205 F.3d at 1069; see also Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering . . . what effect would arise if not one, but many or every, State adopted similar legislation."). There is no specific evidence in the record to suggest how many quarries, or other commercial entities relying on trucks in conducting

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[13] A fact that the City of Greenwood understood as it was specifically recited in the 1991 Contract.

their operations, would be affected if many or all municipalities were to adopt ordinances like Greenwood's. Nonetheless, the only reasonable conclusion is that such a situation would create a substantial burden on interstate commerce. In any event, a precise determination is not necessary because there is clearly a burden substantial enough to outweigh the *de minimis* local benefit of the Ordinance.

Finally, courts are to consider whether the local interest involved "could be promoted as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142. The evidence presented at trial clearly establishes that Greenwood could have addressed its concerns regarding the health and safety of its citizens with a lesser impact on interstate activities. For example, Greenwood's expressed concerns about the condition of Second Avenue could have been addressed in the same fashion they had been addressed in 1994, 1995 and 1999 — by asking Martin Marietta to repair the road. Greenwood also takes the position that 600 trucks per day is unsafe. Although there was a significant dispute as to how many trucks actually traveled on the Second Avenue route, Greenwood legislatively banned all through-truck traffic without an attempt to discuss any traffic control alternatives with the Quarry that would have resulted in an acceptable and safe number of trucks traveling on the Second Avenue route.

The Court, applying the Pike balancing test, finds that a ban on through-truck traffic imposes a burden on interstate commerce that is clearly excessive in relation to the purported local benefits of the Ordinance. The Court has considered the claimed local benefits to the City of Greenwood. The Court has considered the impact of the Ordinance on the Plaintiffs and the cumulative impact of several jurisdictions adopting such ordinances. On balance, the Court finds that the burden on interstate commerce substantial enough to outweigh the *de*

minimis local benefits of the Ordinance. Furthermore, it is clear that any local interests could be promoted with a lesser impact on interstate activities. Accordingly, the Third Quarry Ordinance violates the dormant commerce clause and is, therefore, invalid and unenforceable.

E. Permanent Injunctive Relief

Greenwood argues that permanent injunctive relief is improper because Plaintiffs failed to present evidence of irreparable harm. They argue that Plaintiffs' ability to calculate their supposed damages undercuts their claim for injunctive relief. The Court disagrees. The closing of the usual route to trucks from the Quarry made necessary a longer and more expensive haul to reach the intersection of State Highways 150 and 291. Such curtailment of Plaintiffs' business operations is manifestly an irreparable injury justifying the equitable remedy of injunction.

Additionally, even assuming that calculable damages is inconsistent with a finding of irreparable harm as to Plaintiffs, the Court finds that the Ordinance imposes irreparable harm to interstate commerce generally. The potential balkanization of municipalities in Missouri and the resulting impact on the users of Missouri's public roads is the sort of threatened harm that warrants injunctive relief.

Accordingly, under the Commerce Clause, the City of Greenwood is enjoined from taking any action that has the effect of prohibiting all through-truck traffic through the City. Based on the facts of this case, that means that truck traffic must be able to make use of either the existing Second Avenue Route or a route utilizing Allendale Lake Road to travel to and from Highway 150 through the City of Greenfield. As noted in its oral pronunciation at trial, this injunction does not restrict the City from

constructing or otherwise designating alternate truck routes through the City.

III. CONCLUSION

As explained in the foregoing discussion, the Court ORDERS as follows:

1) Declaratory Judgment under Count V is GRANTED in favor of Plaintiff Martin Marietta Materials on the 1991 Contract. The 1991 Contract between the City of Greenwood and Martin Marietta is valid and enforceable. Under and subject to the conditions of the 1991 Contract, Martin Marietta has a present right to use Second Avenue for access to and from the Greenwood Quarry.

2) Judgment is GRANTED in favor of Plaintiff Martin Marietta Materials on Count I - Breach of Contract. The City of Greenwood breached the 1991 Contract by enacting the Quarry Ordinances.

3) Judgment is GRANTED in favor of Defendant on Count II - Unconstitutional Impairment of the 1991 Contract.

4) Judgment is GRANTED in favor of Plaintiffs on Count III - Violation of the Commerce Clause. The Third Quarry Ordinance prohibiting all through-truck traffic through Greenwood is invalid and unenforceable under the dormant Commerce Clause of the United States Constitution.

5) Based on the judgment in favor of Plaintiffs on Count III - Violation of the Commerce Clause, permanent injunctive relief is GRANTED in favor of Plaintiffs under Count IV. The City of Greenwood is enjoined from taking any action

that has the effect of prohibiting all through-truck traffic through the City.

Date: September 4, 2009 /s/ Dean Whipple
Dean Whipple
United States District Judge

DECISION OF THE SUPREME COURT OF MISSOURI DATED, JANUARY 26, 2010

In the Supreme Court of Missouri

SC90440

WD69690 consolidated with WD69787

January Session, 2010

City of Greenwood,
Missouri,
Respondent,

vs. (TRANSFER)

Martin Marietta
Materials, Inc., et al.,
Appellants.

Now at this day, on consideration of the appellant Hunt Martin Materials LLC's application to transfer and appellant Martin Marietta Materials, Inc.'s application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said applications be, and the same are hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2010, and on the 26th day of January, 2010, in the above-entitled cause.

FEDERAL RULE OF CIVIL PROCEDURE 13(a)

Federal Rule of Civil Procedure 13(a) provides:

(a) Compulsory Counterclaim.

(1) In General.

A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions.

The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

Supreme Court, U.S.
FILED
MAY 19 2010
OFFICE OF THE CLERK

No. 09-1308

In The Supreme Court of the United States

MARTIN MARIETTA MATERIALS, INC.
and HUNT MARTIN MATERIALS, LLC,

Petitioners,

v.

CITY OF GREENWOOD, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The jury in this case (which petitioners refer to as *Greenwood I*) awarded compensatory and punitive damages for public nuisance at the conclusion of a trial conducted in March 2008. Several months later, the federal district court in the parallel litigation between the parties (which petitioners refer to as *Martin Marietta I*) refused to grant full faith and credit to issues determined adversely to petitioners in state court and conducted a bench trial on liability and a jury trial on damages. The district court entered its order on the issues decided at the bench trial in September 2008 (Pet. 46a). Petitioners here seek review of the state-court ruling, and the questions presented are, therefore, as follows:

I.

A. Are petitioners entitled to review by this Court of a federal constitutional issue that was not properly presented to the state courts and was not addressed in the opinion of the state appellate court?

B. If so, does an award of punitive damages in state court on a nuisance claim arising from the effects of truck traffic passing through a small city present a compelling reason for the exercise of certiorari review where the defendants (petitioners here) subsequently obtained a judgment of a federal district court, based in part on evidence that was neither offered nor admitted in evidence in state

QUESTIONS PRESENTED – Continued

court, that the city could not prohibit the truck traffic?

II.

A. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review a state court's application of a federal procedural rule?

B. If so, does a state court's refusal to require the dismissal of claims in a case that is adjudicated before the federal action in which those claims purportedly should have been asserted as counter-claims represent an important question of federal law justifying this Court's grant of a writ of certiorari?

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REASONS FOR DENYING THE PETITION

Neither of the Questions Presented in this case is properly before this Court. Even if they were, however, petitioners have failed to demonstrate the "compelling reasons" necessary to justify certiorari review. S. Ct. R. 10.

Petitioners' argument that they have been punished for lawful conduct, in violation of the Due Process Clause, was neither properly presented to nor passed upon by the Missouri courts. Because the Missouri Court of Appeals did not address the due process issue, petitioners must overcome a presumption that they failed to properly present it below. They cannot do so. Petitioners did not raise the lawful-conduct point in their motion for directed verdict at the close of the evidence, as required to preserve the issue under Missouri procedure. Their challenge on appeal to the punitive damages awarded to Respondent City of Greenwood, Missouri ("Greenwood") addressed the sufficiency of the evidence as a matter of state law, with only passing references to due process and this Court's punitive-damages precedents. Because petitioners' constitutional claim was not properly presented below, the record on this issue has not been developed, and the state courts did not have an opportunity to address the claim.

Even if the lawful-conduct argument had been preserved, however, it would not be appropriate for review by this Court. Petitioners' actions in

dispatching quarry trucks along the Second Avenue route through Greenwood were lawful only in the sense that an ordinance passed by Greenwood that halted the truck traffic was determined to be impermissible. But neither the compensatory nor the punitive damages in this case were awarded merely because of the truck traffic; they were awarded because of how the trucks drove and the severe impact they had on Greenwood and its citizens. The law of nuisance, in Missouri and elsewhere, has long distinguished between the validity of a defendant's actions or business in the abstract and the defendant's liability for the consequences of its actions in particular circumstances. None of the justifications proffered by petitioners – most of which were not presented to the state courts in any event – establishes that their conduct was lawful or otherwise permissible in the particular context of this case. As a result, this factually-unique case is not an appropriate vehicle for this Court to delineate the boundaries that substantive due process may impose on the award of punitive damages.

Petitioners' compulsory-counterclaim argument in their second Question Presented is based on Federal Rule of Civil Procedure 13(a). Congress has not given this Court jurisdiction to review state-court decisions turning on the application of federal procedural rules. But even if this Court could entertain the issue, this case does not merit the Court's review. Petitioners do not claim that the Missouri Court of Appeals applied the wrong

standard; they simply quarrel with that court's application of what petitioners acknowledge is the correct standard. Moreover, many decisions of this Court recognize that parties may pursue parallel litigation in the federal and state courts, which is precisely what occurred here.

In the more than two years that have passed since Greenwood was awarded damages against petitioners for public nuisance, petitioners have not paid any portion of the judgment. In their final effort to avoid liability, petitioners have not raised a substantial question for review by this Court, nor one that is procedurally appropriate for the Court's consideration. This Court should deny the Petition for a Writ of Certiorari and bring this case to a close.

I. PETITIONERS DID NOT PROPERLY PRESENT THEIR DUE PROCESS ARGUMENT TO THE MISSOURI COURTS.

This Court will review a state-court decision "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981); *see also McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (discussing "reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of a state whose judicial action we are called upon to review"). Where the highest state court

fails to pass on a federal question, this Court assumes that the omission is due to lack of proper presentation, unless the party seeking certiorari can affirmatively demonstrate the contrary. *Webb*, 451 U.S. at 495; *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

A petitioner seeking review of an issue by this Court must comply with state-court procedures in raising the point below. *See In re Lamkin*, 355 U.S. 59, 59 (1957) (denying petition for writ of certiorari where petitioner failed to comply with applicable state procedures below); *Adams*, 520 U.S. at 87-88 (discussing failure to comply with state procedural rules as adequate and independent ground for state court's disregarding of claim); *Webb*, 451 U.S. at 493 (referring to requirement to apprise state court of nature or substance of federal claim "at the time and in the manner required by the state law"). Among other things, a party seeking to raise a constitutional question in the Missouri courts must assert it at the first available opportunity, specifically designate or quote the constitutional provision alleged to have been violated, and preserve the question throughout the litigation. *State ex rel. Thompson v. Roberts*, 264 S.W.2d 314, 317 (Mo. 1954); *Shipley v. Cates*, 200 S.W.3d 529, 534 n.5 (Mo. 2006) (en banc).

The opinion of the Missouri Court of Appeals in this case did not address the lawful-conduct argument raised by petitioners in their first Question Presented in this Court. Petitioners thus have the burden to affirmatively demonstrate that they

properly presented this issue to the Missouri courts. *Webb*, 451 U.S. at 495. Petitioners have not even attempted to comply with this Court's Rule 14.1(g)(i), which requires them to specify when and how they raised the federal question they seek to have reviewed by this Court. The record of this case demonstrates that petitioners could not have complied with Rule 14.1(g)(i) if they had attempted to do so.

A. Petitioners Did Not Identify the Lawful-Conduct Issue as a Ground for Relief in Their Motion for Directed Verdict.

Petitioners' motion for directed verdict at the close of the evidence in this case included only three paragraphs directed to punitive damages.[1] That argument did not refer to the Constitution or any constitutional rights, and all of the cases cited by petitioners were decisions of the Missouri courts applying state law. Aside from the recitation of general principles, the substance of the argument concerning the punitive damages awarded for nuisance consisted of the following:

> "The only nuisance evidence here is that independent trucks use 2nd Avenue and such trucks are not owned or controlled by

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[1] Defendants' Motion for Directed Verdict at the Close of All Evidence with Suggestions in Support, at 8-9 (Mo. Cir. Ct. Mar. 12, 2008).

> Defendants. There is even a Federal Court injunction allowing rock trucks to use 2nd Avenue. . . . There is simply no evidence that Hunt Martin (which didn't even exist when the street repairs were made) or Martin Marietta have acted in a way that would merit a punitive damages award."[2]

B. The Lawful-Conduct Argument in Petitioners' Motion for Judgment Notwithstanding the Verdict Did Not Preserve the Point.

After trial, petitioners filed two motions for judgment notwithstanding the verdict. Those motions were accompanied by two briefs, one of which was devoted to issues of punitive damages.[3] In contrast to the directed-verdict papers, petitioners' brief at this stage of the case identified a constitutionally-based argument similar to the issue they raise in this Court, which was captioned as follows: "II. The Fourteenth Amendment Prohibits Punishment for the Lawful Use of a Public Road Pursuant to Express Authorization To Do So."[4] Although some of the discussion that followed was grounded in state law,

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[2] *Id.* at 9.

[3] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial on Punitive Damages (Mo. Cir. Ct. Apr. 14, 2008) ("JNOV Suggestions").

[4] JNOV Suggestions at 11.

petitioners cited *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and otherwise made clear that the thrust of their argument was constitutional.[5] In addition, petitioners advanced other due process arguments concerning the punitive damages awarded.[6]

As in the federal system, however, a motion for judgment notwithstanding the verdict in Missouri serves as a request "to have judgment entered in accordance with the motion for a directed verdict." Mo. R. Civ. P. 72.01(b). An issue not raised in a motion for directed verdict cannot serve as the basis for a motion for judgment notwithstanding a verdict, nor is such an issue preserved for appeal. *Burrell v. O'Reilly Automotive, Inc.*, 175 S.W.3d 642, 648-49 (Mo. Ct. App. 2005); *Goede v. Aerojet General Corp.*, 143 S.W.3d 14, 18 (Mo. Ct. App. 2004); *see generally Robbins v. Robbins*, 328 S.W.2d 552, 555 (Mo. 1959) (Missouri appellate courts cannot review a matter that is not presented to or expressly decided by the trial court); Mo. Rev. Stat. § 512.160.1. As a result,

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[5] JNOV Suggestions at 12.

[6] Petitioners argued that the punitive damages were unconstitutionally excessive and that the trial court improperly permitted the jury to consider evidence of Martin Marietta's nationwide revenues. JNOV Suggestions at 16-17. Neither of these arguments was renewed on appeal, and neither is before this Court.

petitioners' attempt to assert their lawful-conduct argument after trial was of no consequence.

C. Petitioners' Fleeting References to Due Process Principles in their Challenge on Appeal to the Sufficiency of the Evidence Supporting Punitive Damages Were Insufficient To Preserve the Issue for Review by this Court.

Even if petitioners had preserved the lawful-conduct issue in the trial court, their abandonment of the point on appeal would preclude review by this Court. In the Missouri Court of Appeals, Petitioner Martin Marietta Materials, Inc. ("Martin Marietta") filed a 150-page opening brief of 30,977 words.[7] As mandated by Missouri procedure, that brief specified eleven "Points Relied On," each of which was required to identify the ruling of the trial court that was challenged, state the legal reasons for the claim of reversible error, and explain in summary fashion why, in the context of the case, the legal reasons

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[7] Petitioner Hunt Martin Materials, LLC ("Hunt Martin") filed a separate brief that included one Point Relied On addressed to punitive damages. Brief of Appellant Hunt Martin Materials, Inc., at 10 (Mo. Ct. App. Dec. 1, 2008). Both the point and its supporting argument focused entirely on the proposition that Greenwood had failed to present clear and convincing evidence of Hunt Martin's complete indifference to or conscious disregard for the safety of others. *Id.* at 10, 24-26. Hunt Martin did not cite the Due Process Clause or any cases addressing the issue of lawful conduct and punitive damages.

supported the claim of error. *See* Mo. R. Civ. P. 84.04(d)(1). The only Point Relied On conceivably relevant to the due process claim pressed by petitioners in this Court read as follows:

> "X. The Trial Court Erred in Failing To Grant Appellant's Motions for a Directed Verdict, for JNOV and for a New Trial on the Issue of Punitive Damages and in Submitting the Issue of Punitive Damages to the Jury Because Greenwood Failed To Offer Evidence To Support Punitive Damages in that Greenwood Failed To Present Clear and Convincing Evidence of Appellant's Evil Motive or its Legal Equivalents in Paying Contractors To Make Repairs to Second Avenue or in Making its Quarry Products Available to the Contractors of the Quarry's Customers Who Legally Used the Street Greenwood Had Designated as a Commercial Truck Route for Years."[8]

This Point Relied On did not adequately preserve the lawful-conduct argument. "To properly assert a violation of a constitutional right in a point relied on, an appellant must specifically identify the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself." *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. 1998) (en banc). When an appellant does not claim a violation of a particular

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[8] Brief of Appellant Martin Marietta Materials, Inc., at 42 (Mo. Ct. App. Dec. 1, 2008) ("Martin Marietta Brief").

constitutional right in its Points Relied On, that issue is not before the appellate court. *State v. Damask*, 936 S.W.2d 565, 570 (Mo. 1996) (en banc) (refusing to consider Fourth Amendment challenge to detention and search where Point Relied On challenged only initial traffic stop); *State v. Shaw*, 847 S.W.2d 768, 773 n.4 (Mo. 1993) (en banc) (First Amendment argument not included in Points Relied On in court of appeals was abandoned); *Pruellage v. De Seaton Corp.*, 380 S.W.2d 403, 405 (Mo. 1964) (constitutional question not included in Points Relied On is considered abandoned and no longer an issue in the case).[9] *See generally Adams*, 520 U.S. at 87-88 & n.1 (noting that failure to identify federal claim in "statement of issues" required by state procedural rules appeared to be adequate and independent ground for this Court's refusal to entertain issue); *Webb*, 451 U.S. at 498 n.4 (remarking that petitioner had not demonstrated that state supreme court's failure to reach federal issue was not based on her failure to cite authority to support enumerated errors, as required by state procedure).

Following its Point Relied On, Martin Marietta was required to list up to four cases, as well as

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[9] Even where non-constitutional issues are involved, the Missouri courts treat arguments "not set out in the point relied on but merely referred to in the argument portion of the brief" as abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. 2002) (en banc); *see also Frager v. Glick*, 347 S.W.2d 385, 390-91 (Mo. 1961).

constitutional provisions, on which it principally relied. *See* Mo. R. Civ. P. 84.04(d)(5). Martin Marietta cited three cases, each of which turned on the sufficiency of evidence supporting punitive damages solely as a matter of *state* law.[10] Martin Marietta did not cite the Due Process Clause there or anywhere else in its brief.

Martin Marietta's argument supporting Point X occupied fifteen pages of its brief. As the point itself suggested, the argument focused on the sufficiency of the evidence of petitioners' evil motive. For example, Martin Marietta identified the standard of review as "clear and convincing evidence that the defendants acted with an evil mind or [its] legal equivalent,"[11] rather than the *de novo* standard applicable to a due process challenge to punitive damages. *See Krysa v. Payne*, 176 S.W.3d 150, 156 (Mo. Ct. App. 2005), citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Martin Marietta also included two lengthy discussions of *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. 2001) (en banc).[12] In that case, the Supreme Court of Missouri reversed an award of punitive damages because the defendant's actions were consistent with applicable regulations.

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[10] Martin Marietta Brief at 42, citing *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. 2001) (en banc); *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989) (en banc); and *Peters v. General Motors Corp.*, 200 S.W.3d 1 (Mo. Ct. App. 2006).

[11] Martin Marietta Brief at 132.

[12] Martin Marietta Brief at 137-38, 141-42.

See id. at 248-49. But that holding was based on state law; the court held that the defendant's compliance with applicable law defeated the plaintiff's effort to show that the defendant acted with a mental state sufficient to permit the imposition of punitive damages. *See id.* at 249. Martin Marietta also cited a number of other cases, from Missouri and elsewhere, in support of the same and similar propositions.[13]

Martin Marietta used the words "due process" three times in its argument regarding the submissibility of punitive damages, and the phrase also appeared twice in quotations from cases.[14] In addition, *Campbell* was cited twice – in connection with a reference to "the most basic notions of fairness and due process" and for the proposition that a state cannot punish conduct that was lawful where it

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[13] *Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 507 (Mo. Ct. App. 1999) (a party who acts in good faith and honestly believes that his act is lawful is not liable for punitive damages under Missouri law); *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1125-26 (7th Cir. 1975) (reversing permanent injunction against operation of business that complied with zoning and other laws and concluding that "[o]n balance," grounds for punitive damages did not exist); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (under state law, punitive damages are "as a general rule, improper where a defendant has adhered to environmental and safety regulations"); *Booth v. Hanson Aggregates N.Y., Inc.*, 791 N.Y.S.2d 766, 768 (App. Div. 2005) (defendant's continuing operation in reliance on consultant's study and state permit did not constitute "willful or wanton negligence or recklessness").

[14] Martin Marietta Brief at 138, 141, 143.

occurred – and *Gore* once, for the point that a person cannot be punished for what the law plainly allows him to do.[15] After each of these citations, Martin Marietta promptly resumed its discussion of the sufficiency of the evidence under state law. Its stray references to constitutional principles, coming as they did in the midst of an argument based on state law, were not sufficient to preserve the constitutionality of the punitive damage award under the Fourteenth Amendment for this Court's review. "The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams*, 520 U.S. at 88, quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (plurality opinion) (refusing to consider challenge to jury instruction on punitive damages where petitioner "did not squarely argue" in state court that instruction violated due process).

Moreover, the mere use of a phrase that may have constitutional significance does not preserve a constitutional claim. *See Webb*, 451 U.S. at 496 (several references to "full faith and credit" were insufficient to preserve claim under Full Faith and Credit Clause); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 (1988) (argument characterizing

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[15] Martin Marietta Brief at 138, 141.

punitive damages as an excessive fine was insufficient to preserve claim under Eighth Amendment's Excessive Fines Clause). This principle is particularly applicable where the federal and state constitutions have provisions with similar labels. *See Bankers Life*, 486 U.S. at 78 (noting that Mississippi Constitution also prohibited excessive fines). A bare reference to "due process" involves just such an ambiguity. *Compare* U.S. Const. amend. XIV, § 1 *with* Mo. Const. art. I, § 10.

The conclusion of the argument supporting Martin Marietta's Point X exemplifies its failure to preserve the lawful-conduct issue that it asks this Court to review. Following one of its discussions of state-law cases on the sufficiency of the evidence to support punitive damages, Martin Marietta argued that the award of punitive damages in this case "fundamentally by-passes the necessity of showing an evil mind by clear and convincing evidence and thus violates due process guarantees."[16] This assertion betrays a lack of preservation of petitioners' first Question Presented and, in fact, is a *non sequitur*, for the Due Process Clause does not require such a showing. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (rejecting argument that preponderance standard is unconstitutional).

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[16] Martin Marietta Brief at 143.

Viewed generously, Martin Marietta's presentation to the Missouri Court of Appeals included a "vague appeal to constitutional principles," which does not preserve an argument for review by this Court. *Bankers Life*, 486 U.S. at 77. And, as noted, Hunt Martin did not even mention the Constitution or any of its provisions. In the circumstances of this case, "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Adams*, 520 U.S. at 89.[17] Accordingly, even if petitioners had not waived their lawful-conduct argument by failing to raise it in their motion for directed verdict, their abandonment of the point on appeal should preclude this Court from entertaining the issue on certiorari.

II. PETITIONERS HAVE NOT DEMONSTRATED COMPELLING REASONS JUSTIFYING THIS COURT'S CONSIDERATION OF THEIR LAWFUL-CONDUCT ARGUMENT.

Petitioners' formulation of their first Question Presented to this Court inappropriately conflates the proceedings held in Missouri state court with those held in federal district court. Petitioners then confuse

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[17] Indeed, Greenwood did not understand that an argument under the Due Process Clause was at issue in petitioners' appeal. Greenwood did not address due process issues in its responsive brief, nor did petitioners in their reply briefs. And, of course, the Missouri Court of Appeals did not discuss the issue.

the issues in the two cases, which are, in significant respects, distinct and independent. The result, suggest petitioners, is a state court's punishment of "conduct that a federal district court held to be lawful under a valid and enforceable contract and constitutionally protected by the Commerce Clause" (Pet. i).

In reality, the proceedings in the parallel litigation between these parties were both more straightforward and more complex than petitioners have made them appear. This litigation in state court involved the common-law tort of public nuisance. As the Missouri Court of Appeals stated, such a nuisance "is an offense against the public order and economy of the state and violates the public's right to life, health, and the use of property, while, 'at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.'" *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 616 (Mo. Ct. App. 2009), quoting *City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 535 (Mo. Ct. App. 2001) (Pet. 10a). Trial in this case was conducted in March 2008.

The proceedings in federal court involved two relevant claims. First, petitioners contended that a contract executed in 1991 required Greenwood in good faith to continue to designate the Second Avenue route through the city as available for commercial use. This agreement is not part of the "undisputed history of the parties' conduct and the relations

between the parties," as petitioners suggest (Pet. 14). In fact, Greenwood raised substantial questions as to its enforceability, the interpretation of ambiguous language within it, and whether Greenwood acted in good faith in closing the road to through commercial traffic. The federal judge resolved these issues in favor of petitioners at a bench trial, despite Greenwood's argument that the latter two issues were matters for the jury to decide (Pet. 50a, 52a).

Petitioners also claimed that Greenwood's restriction of commercial traffic on Second Avenue violated the Commerce Clause, on the theory that the burden of the city's ordinance upon interstate commerce was clearly excessive in comparison to its local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This issue also was adjudicated by the federal judge in favor of petitioners (Pet. 59a), over Greenwood's objection that it was a claim at law because petitioners sought damages under 42 U.S.C. § 1983. The trial in federal court was conducted in June and July 2008, and only the amount of damages was determined by the jury. The district court's decision on the matters decided by the court was entered in September 2008 (Pet. 46a).

As petitioners acknowledge, Greenwood has appealed the judgment of the district court to the United States Court of Appeals for the Eighth Circuit. The issues in that appeal include Greenwood's Seventh Amendment right to a jury trial, the validity of the 1991 contract, the district court's determination of the Commerce Clause claim, petitioners'

failure to establish a nexus between interstate commerce and the damages they sought, and the district court's refusal to prohibit relitigation of issues previously determined adversely to petitioners on the nuisance claim in state court. The Eighth Circuit heard oral argument and took Greenwood's appeal under submission on September 21, 2009.

A. The Decision of the Missouri Court of Appeals Is Not Inconsistent with This Court's Precedents, Because Petitioners Have Not Been Punished on Account of Lawful Conduct.

Petitioners do not seek this Court's review on the basis that the federal courts of appeals and state courts of last resort are in disagreement on the lawful-conduct question raised by petitioners. Rather, petitioners argue that the Missouri courts' handling of the punitive damages in this case is inconsistent with this Court's precedents (Pet. 13). The record in this case, along with common-law and common-sense principles, demonstrates that petitioners are incorrect.

1. Petitioners Were Not Required To Pay Punitive Damages Merely Because Trucks Used Second Avenue.

Throughout their petition, petitioners characterize the parallel state and federal cases as fundamentally irreconcilable, because the behavior

punished in state court was "the very conduct" that the federal district court concluded was "plainly allowed" (Pet. 14, 16). The record does not support this assertion.

Petitioners commenced the federal litigation because of Greenwood's passage of an ordinance that effectively precluded them from dispatching vehicles from their quarry, located south of Greenwood, along Second Avenue to points north of Greenwood.[18] The district court invalidated the ordinance, and the federal-court jury awarded petitioners more than $468,000 in damages for Greenwood's supposed breach of the 1991 contract and violation of the Commerce Clause. The district court also enjoined Greenwood "from taking any action that has the effect of prohibiting all through-truck traffic through the City" (Pet. 60a).

The "very conduct" validated by the federal court, therefore, was the driving of trucks along Second Avenue or another north-south route that might be offered by Greenwood as an alternative. If the Missouri state courts had authorized the punishment

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[18] Perhaps in an effort to overstate the interstate-commerce aspects of their claim, petitioners suggest that their goal is to reach Interstate Highways 35 and 435 (Pet. 3). But these highways, which are located many miles from Greenwood, were not the subject of evidence or argument in either state court or federal court. The undisputed evidence is that petitioners' primary market is the city of Lee's Summit, Missouri, which is immediately north of Greenwood, and the main point of interest is the intersection of Missouri State Highways 150 and 291.

of petitioners solely for this particular conduct, petitioners might well have a valid complaint about their treatment – one that they should have raised in the state courts in the first instance, of course.

But petitioners were not punished merely for the existence of the traffic they set in motion. In fact, they were not even found liable for *compensatory* damages on that basis. In the Missouri Court of Appeals, petitioners argued that "traffic alone cannot constitute a nuisance" (Pet. 12a). The court acknowledged that this was a correct principle of law, but not an applicable one, because the issue in this case was "whether the trucks' use of Second Avenue was reasonable" (Pet. 13a). Recognizing that Greenwood complained not merely of the existence of traffic, but also of "the effect of large trucks transporting crushed rock at times through a residential area at the rate of every one to two minutes," the Missouri Court of Appeals concluded that Greenwood had adequately proved its claim for public nuisance (*id.*).

2. Conduct That Is Lawful in General May Be Wrongful in a Particular Circumstance or Context.

The law makes a significant distinction between the legality of an act in the abstract and the actor's potential liability for the manner in which that act is performed, or the consequences the act may have for others. For example, one may not "insist upon a street meeting in the middle of Times Square at the

rush hour as a form of freedom of speech or assembly." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Conspirators may be punished for pursuing "some purpose not in itself criminal or unlawful by criminal or unlawful means." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921); *see also Ritterbusch v. Holt*, 789 S.W.2d 491, 494 (Mo. 1990) (en banc) (civil conspiracy may involve use of "unlawful means to do an act which is lawful"). Similarly, a defendant may be liable under the theory of *prima facie* tort for engaging in "an intentional lawful act" with intent to injure another. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993) (en banc).

The distinction between the general legality of an act and the actor's liability for damages is particularly meaningful in a case involving a nuisance. As this Court stated in its seminal decision upholding zoning regulations,

> "the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (citation omitted).

Missouri nuisance law recognizes the same distinction. *See, e.g., Looney v. Hindman*, 649 S.W.2d 207, 213 (Mo. 1983) (en banc) ("The term 'nuisance' connotes the use of one's property in a manner which is not abstractly unlawful but which, in the circumstances, demonstrates an unreasonable interference with the rights of neighboring property owners."); *Edmonson v. City of Moberly*, 11 S.W. 990 (Mo. 1889) (city's legal authority to establish sewer system did not permit city to exercise power in such a manner as to create a nuisance); *Streett v. Marshall*, 291 S.W. 494, 499 (Mo. 1927) (en banc) (funeral home that was "not only lawful but indispensable" yet located in a residential neighborhood was a nuisance as a matter of law); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784, 795 (Mo. 1970) (affirming award of compensatory and punitive damages for nuisance despite defendant's argument "that its business was lawful"); *Hawkins v. Burlington Northern, Inc.*, 514 S.W.2d 593, 598-99 (Mo. 1974) (en banc) (rejecting defendant's argument that statute with which it claimed to have complied supplanted common law of nuisance).[19]

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[19] *See generally* Restatement (Second) of Torts § 831 cmt. b (1979) ("There are suitable and unsuitable places for carrying on all lawful activities and sound public policy demands that people carry them on in suitable places so as to avoid as much of the conflict between incompatible interests as possible."); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1214 (9th Cir. 2003) ("[T]he fact that a certain occupation or business can be performed in a legal manner does not prevent that occupation or business from becoming a nuisance when the occupation or business is

(Continued on following page)

3. Petitioners Are Not Immune from Punishment for Creating a Public Nuisance.

Petitioners cite three bases for their assertion that the conduct for which punitive damages were imposed was lawful: the 1991 contract, the Commerce Clause, and Greenwood's designation of Second Avenue as a commercial-use route before June 2006 (Pet. 14-22).[20] Each of these three arguments suffers from the general flaw discussed above – *i.e.*, each authorized, at most, the mere presence of trucks on Second Avenue, and not their deleterious impact on Greenwood and its residents – but each is problematic for other reasons as well.

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performed in a manner that unreasonably infringes on a public right."); *Storey v. Central Hide & Rendering Co.*, 226 S.W.2d 615, 617 (Tex. 1950) (a lawful business may become a nuisance when it is operated in a place or manner as to seriously interfere with the enjoyment of life and property); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 n.4 (Ohio 2002) (a qualified nuisance involves a lawful act negligently or carelessly done); *Grundy v. Thurston County*, 117 P.3d 1089, 1092 n.5 (Wash. 2005) (a lawful action may still be a nuisance); *City of Atlanta v. Kleber*, 677 S.E.2d 134, 135 n.1 (Ga. 2009) (the fact that an act is otherwise lawful does not prevent it from being a nuisance).

[20] Petitioners also argue that they had a reasonable belief that their conduct was lawful or otherwise protected (Pet. 15, 16). Assuming for the sake of argument that petitioners presented evidence to support this contention and argued the issue before the jury, the verdict in this case demonstrates clearly that the jury did not find it persuasive. The Due Process Clause does not require or permit a reviewing court to credit a defendant's self-serving testimony that it acted in good faith when the factfinder has determined otherwise.

Although petitioners identified the 1991 contract in an affirmative defense in their answer in this state-court case, they made no effort to pursue that defense. They did not move to dismiss the case or seek summary judgment on the basis of the contract; they did not offer the contract into evidence at trial; and they did not request that the jury be instructed on their contractual defense. Petitioners apparently chose to proceed in this fashion because they were justifiably concerned that the state courts might rule that the contract was unenforceable. But whatever the reason for petitioners' choice not to present the contract to the state court for consideration, they cannot now complain of constitutional error by a court that was never presented with either evidence or argument in support of what petitioners now claim to have been their rights.

Petitioners' argument based on the Commerce Clause is similarly flawed. Several months after the jury awarded punitive damages to Greenwood in state court, the federal district court held that Greenwood's ordinance barring through-truck traffic violated the Commerce Clause (Pet. 59a-60a). But petitioners did not rely on the Commerce Clause at trial in state court as justification for their actions, and they did not assert the Commerce Clause as a ground for relief on appeal. In any event, the federal court's interpretation of the Commerce Clause protected petitioners only against claims that they violated Greenwood's ordinance by dispatching trucks along Second Avenue. The district court ruled that

petitioners' trucks must be permitted to use the road, not that they must be permitted to pollute, to spew dust throughout the neighborhood, to require residents and businesses to keep their windows closed because of the noise, or to force children out of their front yards and off their bicycles. *See City of Greenwood*, 299 S.W.3d at 613 (Pet. 4a).

Although petitioners' argument regarding Greenwood's identification of Second Avenue as a route for commercial traffic prior to 2006 is not fundamentally different from its arguments regarding the 1991 contract and the Commerce Clause, petitioners phrase the argument in terms of fair notice rather than substance (Pet. 19). That distinction does not make a difference. As with the 1991 contract and the Commerce Clause, Greenwood's pre-2006 ordinance simply authorized commercial vehicles to use Second Avenue for through traffic; it did not permit those vehicles to operate in any manner petitioners deemed appropriate, without regard to the consequences.

As for the issue of fair notice, due process "is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *TXO*, 509 U.S. at 466. More than a century of Missouri precedent advised petitioners that they could be liable for punitive damages for maintaining a nuisance willfully or with reckless indifference to the rights of others. *See, e.g.*, *Paddock v. Somes*, 51 Mo. App. 320, 325 (1892); *Krebs v. Bambrick Bros. Constr. Co.*, 129 S.W. 425 (Mo. Ct. App. 1910); *Schumacher v. Shawhan Distillery Co.*,

165 S.W. 1142, 1144 (Mo. Ct. App. 1914); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752, 756-58 (Mo. 1968); *Hawkins*, 514 S.W.2d at 603; *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (en banc); *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 222 (Mo. Ct. App. 1985).

B. In the Context of a Nuisance Action, Petitioners' Lawful-Conduct Argument Does Not Present an Important Question of Federal Law Meriting This Court's Review.

Petitioners suggest that "*no* award of punitive damages is constitutionally permissible" in certain cases or circumstances (Pet. 11). Assuming that this proposition has some merit in the abstract, this fact-bound case is not an appropriate vehicle for the delineation of its boundaries. As discussed above, nuisance law requires the balancing of the rights of the respective parties, often in situations in which a defendant's activities are lawful in general but unreasonable, and thus tortious, in their specifics. Despite petitioners' efforts to paint the scene in starkly contrasting hues – the federal court held that their conduct was lawful, while the state court punished them for engaging in it – the reality of this case, like many nuisance cases, is far more nuanced. And the Missouri courts were not provided an opportunity to weigh in on the constitutional question now pressed by petitioners.

If this Court is inclined to consider whether substantive due process categorically bars punitive damages where lawful conduct is at issue, it should grant certiorari in a case with a fully-developed record and no room for dispute that the defendant's actions were authorized in the specific respects that gave rise to the plaintiff's claims. Because this is not such a case, the petition should be denied.

III. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW A STATE COURT'S APPLICATION OF A FEDERAL RULE OF CIVIL PROCEDURE.

This Court's jurisdiction to review state-court judgments is limited, in relevant part, to cases "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a). The compulsory-counterclaim issue raised by petitioners involves no such title, right, privilege, or immunity. Rather, petitioners' second Question Presented argues that the Missouri courts misapplied Federal Rule of Civil Procedure 13(a), which governs compulsory counterclaims in civil actions in the federal courts.

This Court's certiorari jurisdiction is governed by statute. U.S. Const. art. III, § 2; *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810). Section 1257(a) affirmatively authorizes this Court to review state-court decisions in which parties claim rights or

immunities under certain bodies of federal law, but these do not include federal procedural rules. Congress' affirmative description of this Court's jurisdiction "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." *Durousseau*, 10 U.S. at 314. Accordingly, even if this were a case that otherwise called out for this Court's intervention – which it is not, for the reasons explained below – the Court would not have the power to address the Missouri courts' application of Rule 13(a).

IV. PETITIONERS' DISAGREEMENT WITH THE MISSOURI COURT'S APPLICATION OF RULE 13(a) TO ALLEGED COMPULSORY COUNTERCLAIMS PRIOR TO JUDGMENT IS NOT AN IMPORTANT FEDERAL QUESTION REQUIRING A RESOLUTION BY THIS COURT.

In connection with their second Question Presented, petitioners suggest that the courts have applied four different tests to determine whether a counterclaim is compulsory for purposes of Rule 13(a) (Pet. 25). They also cite a law-review article in which the author criticizes these four tests and proposes more than 20 alternatives. *See* Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 729-30 & n.160 (2007). Nevertheless, petitioners argued below that the "logical relationship" test was the appropriate one (Pet. 28a), and the Missouri Court of

Appeals agreed (Pet. 28a-29a). Petitioners cannot and do not suggest now that the Court of Appeals should have applied a different test; rather, they complain that the "Missouri Court of Appeals *misapplied* the logical relationship test" (Pet. 27) (emphasis added). This Court rarely grants certiorari to address "the misapplication of a properly stated rule of law." S. Ct. R. 10. Even aside from the jurisdictional problem addressed above, this is not the rare case in which this Court should depart from its ordinary practice.

It is important to understand what is and is not at issue in this case. This is not, for example, a situation in which related actions were filed and pending simultaneously in two different federal judicial districts. *Cf. Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1263 (7th Cir. 1977) (discussing one court's power to enjoin prosecution of claims in another). Nor does this case involve a party's failure to assert claims until after a final judgment on related matters in federal court. *Cf. Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1078-79 (5th Cir. 1984); *Polymer Indus. Products Co. v. Bridgestone/Firestone, Inc.*, 347 F.3d 935, 935-36 (Fed. Cir. 2003); *Central W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 429 (6th Cir. 2007). In those situations, Rule 13(a) is directly applicable and permits the federal courts to ensure the orderly presentation of claims. In the latter situation, principles of claim preclusion and issue preclusion also are implicated. *See generally Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

This dispute, by contrast, involves parallel actions in federal and state court, in which each of the respective defendants asserted no counterclaims. Petitioners' position appears to be that once they commenced litigation in federal court, Greenwood could not assert related claims against them in state court, even prior to the entry of judgment on petitioners' federal claims. But this Court has long recognized that parallel litigation in federal and state court is permissible. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292-93 (2005) (holding that preclusion law, not *Rooker-Feldman* doctrine, governs disposition of federal litigation when parallel state litigation reaches judgment first); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524-25 (1986) ("[S]imultaneous litigation in state and federal courts on the same issue . . . is one of the costs of our dual court system."); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) ("[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."); *McClellan v. Carland*, 217 U.S. 268, 282 (1910) ("[T]he pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies.").

Petitioners' selective and out-of-context recitation of snippets of Greenwood's filings in the two cases cannot transform the Rule 13(a) question into one worthy of this Court's review, even if certiorari were jurisdictionally available. Many of the statements cited by petitioners, for example, were made before Greenwood amended its state-court petition to include the nuisance claim. Prior to that amendment, which occurred several months after this case was removed and remanded, Greenwood had asserted only two claims: one for a declaratory judgment as to the validity of its ordinance under state law and one for petitioners' negligent repair of Second Avenue.[21]

After the nuisance claim was asserted in this case, the factual interrelatedness between the two cases increased, as petitioners acknowledge (Pet. 7). Despite the change in circumstances, the federal court concluded that Greenwood was judicially estopped from invoking the doctrine of issue preclusion following the state court's nuisance judgment (Pet. 49a). Greenwood disagrees with that ruling of the district court and has pressed the issue on appeal to the Eighth Circuit.[22] But that dispute has no

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[21] First Amended Petition for Declaratory Judgment and Other Relief (Mo. Cir. Ct. Feb. 1, 2007); Plaintiff's Motion for Leave to Amend the Petition (Mo. Cir. Ct. Oct. 2, 2007).

[22] Although petitioners now claim that the "facts and evidence that Greenwood relied upon in attempting to defend against Petitioners' Commerce Clause claim in federal court were the same facts and evidence that formed the basis of Greenwood's nuisance claims in state court" (Pet. 29), they have

(Continued on following page)

bearing on the substantiality of the compulsory-counterclaim issue raised in this Court by petitioners.

In sum, this case involves parallel litigation in federal and state courts, and the state court entered judgment first. Petitioners do not claim that the Missouri Court of Appeals applied the wrong standard in its discussion of Rule 13(a); they simply disagree with the court's application of that standard. Even if this Court had jurisdiction to review a state court's application of a federal procedural rule, it should decline to do so in this case.

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taken a different position before the Eighth Circuit. In response to Greenwood's argument that the district court should have precluded petitioners from relitigating the issues decided in Greenwood's favor on the nuisance claim, petitioners argued that issue preclusion was inappropriate because the two cases did not involve the same issues. Appellees' Response Brief, No. 08-3983, at 67-68 (8th Cir. May 19, 2009).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 28 2010
OFFICE OF THE CLERK

No. 09-1308

IN THE

Supreme Court of the United States

MARTIN MARIETTA MATERIALS, INC.
and HUNT MARTIN MATERIALS, LLC,

Petitioners,

v.

CITY OF GREENWOOD, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS

REPLY BRIEF

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PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

The corporate disclosure statement for Petitioners Martin Marietta Materials, Inc. and Hunt Martin Materials, LLC was set forth on page ii of their Petition For a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

This case presents two important questions of federal law that (contrary to Greenwood's contentions) are fully preserved and properly within the jurisdiction of the Court.[1] First, the punitive damages award raises fundamental due process issues. Greenwood, a municipality, has been awarded $10 million in punitive damages punishing conduct that was found by a federal district court to be protected under the Commerce Clause, was permitted by Greenwood's own ordinance, and was authorized by a contract between Greenwood and Petitioners. The due process issues of fair notice and punishment of lawful conduct raised by this case warrant a grant of certiorari.

The importance of the second question presented on the issue of federal compulsory counterclaims is not lessened, as Greenwood claims, because it arises from a decision in state court. Indeed, such issues of federal law arise frequently in state courts, and uniformity as to the standard applied is essential to the proper functioning and cohesiveness of the dual state-federal judicial system. The conflict between the differing standards applied by the Missouri Court of Appeals and federal circuit courts merits resolution by this Court.

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[1] On May 25, 2010, the Missouri Supreme Court declined review of a related decision by the Missouri Court of Appeals, reversing the state trial court's entry of an injunction prohibiting the truck traffic at issue here. Greenwood has sought a stay of the mandate "so that [it] may file a petition for writ of certiorari" in this Court.

I. PETITIONERS' DUE PROCESS ARGUMENT WAS FULLY PRESERVED

Petitioners preserved below their due process argument that the punitive damages award impermissibly punishes lawful conduct. It is "well settled" that to preserve a constitutional issue for review by this Court, "'[n]o particular form of words or phrases is essential.'" *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) (citation omitted). All that is required is that the claim "'be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'" *Id.* (citation omitted). Here, the record demonstrates that the Missouri trial and appellate courts had "'a fair opportunity to address the federal question[s] that [are] sought to be presented.'" *See Adams v. Robertson*, 520 U.S. 83, 87 (1997) (citation omitted).

In its brief to the Missouri Court of Appeals, Martin Marietta set forth its due process argument in a section entitled, "Punitive Damages may not be used to punish or deter lawful conduct."[2] Greenwood incorrectly asserts that Martin Marietta "did not cite the Due Process Clause" in that section "or anywhere else in its brief." Opp. 11. In fact, Martin Marietta argued that "'[a] decision to punish a tortfeasor by means of an exaction of punitive damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment,'" and that the punitive award in this case was inconsistent with "Due

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[2] Martin Marietta's Br. at 140 (Mo. Ct. App. Dec. 1, 2008). Moreover, contrary to Greenwood's contention (Opp. 8 n.7, 15), Hunt Martin expressly incorporated in its appellate brief Martin Marietta's challenge to the punitive damages award. Hunt Martin's Br. at 13 n.1 (Mo. Ct. App. Dec. 1, 2008).

Process guarantees," "betray[ed] the most basic notions of fairness and due process," and "violate[d] due process guarantees" because it punished lawful conduct.[3] Martin Marietta quoted from *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the propositions that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort" and that "[a] State cannot punish a defendant for conduct that was lawful where it occurred."[4] Martin Marietta explained that the conduct punished was lawful because Greenwood had "designated" Second Avenue as the exclusive through-truck route, the 1991 contract between the parties gave Petitioners "express permission" to use Second Avenue, and Petitioners had the "blessing of a federal court" to continue using Second Avenue.[5]

Contrary to Greenwood's contentions, this due process argument was not merely "the discussion of 'a federal case, in the midst of an unrelated

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[3] Martin Marietta's Br. at 138, 141 & n.25, 143 (Mo. Ct. App. Dec. 1, 2008).

[4] *Id.* at 141.

[5] *Id.* at 142-43. Greenwood's argument that Martin Marietta's "Point Relied On" was deficient (Opp. 9-10) is unavailing. Missouri appellate courts do not refuse review "unless the deficiency [in a "Point Relied On" or argument] impedes disposition on the merits" — *i.e.*, the "brief ... is so deficient that it fails to give notice to th[e] [c]ourt and to the other parties as to the issue presented on appeal." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. 1997); *see also Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 340-42 (Mo. 1993) (considering constitutional issue over dissenting opinion that "Point Relied On" was "woefully insufficient"). Here, Martin Marietta's "Point Relied On" expressly referenced the lawful use of Greenwood's streets, and, as shown above, its brief fully presented its due process argument. Thus, the purported deficiencies in the "Point Relied On" do not support waiver.

argument.'" Opp. 13 (quoting *Adams*, 520 U.S. at 88 (citation omitted)). Rather, Martin Marietta's due process argument was squarely presented and was more than sufficient "'to inform [the] state court'" that it was making a constitutional due process claim. *Adams*, 520 U.S. at 88 (citation omitted).[6] That the Missouri Court of Appeals did not explicitly rule on Martin Marietta's due process argument does not preclude this Court's review of those constitutional issues. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983).

Petitioners also preserved their due process argument in the trial court. In their joint motion for JNOV/new trial, Petitioners argued that "[p]unitive damages are not authorized in this case because the Fourteenth Amendment prohibits punishment for the lawful use of a public road with permission and authorization to use the public road"[7] and that "the mere imposition of punitive damages for conduct submitted to a federal court and determined to be legal is unconstitutional on its face ...."[8] Petitioners' reliance on the federal constitution's "Due Process guarantees" is underscored by the section heading: "The Fourteenth Amendment Prohibits Punishment

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[6] Petitioners also preserved their due process argument in their applications for transfer to the Missouri Supreme Court. For example, Hunt Martin's application cited *Campbell* and *Gore*, arguing that the punitive award "raise[d] a serious constitutional issue" because Petitioners were "being punished ... for obeying Greenwood's designation of Second Avenue as a commercial truck route on Greenwood's Second Avenue." Hunt Martin's Transfer Application at 1, 5-6 (Mo. Oct. 6, 2009); *see also* Hunt Martin's Motion for Rehearing/Transfer Application at 2, 5 (Mo. Ct. App. Aug. 25, 2009); Martin Marietta's Transfer Application at 4 (Mo. Oct. 6, 2009).

[7] Motion for JNOV/New Trial ¶ 16 (Mo. Cir. Ct. Apr. 14, 2008).

[8] Suggestions in Support of Motion for JNOV/New Trial on Punitive Damages at 12 (Mo. Cir. Ct. Apr. 14, 2008) (citing and quoting *Campbell*, *Gore*, and *Bordenkircher*).

for the Lawful Use of a Public Road Pursuant to Express Authorization to Do So."[9]

Greenwood erroneously contends that Petitioners waived the due process argument by not raising it in their motion for directed verdict. Opp. 7-8. Missouri procedural law does not require that all arguments be raised in a directed verdict motion to preserve them for appellate review. Directed verdict motions address the sufficiency of the evidence. *See, e.g., Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. 2010). Petitioners' argument that due process prohibits punishment of their lawful conduct raised a legal, constitutional question and did not go to sufficiency of the evidence. Such a question was not required to be included in a directed verdict motion but was properly preserved in Petitioners' motion for a new trial. *See, e.g., Call v. Heard*, 925 S.W.2d 840, 847 (Mo. 1996) (federal due process challenge to punitive damages award preserved when raised for first time in motion for new trial).[10]

In sum, Petitioners' argument that the punitive damages award contravened due process because it punished lawful conduct was preserved at every stage of this litigation.

II. THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY PUNISHES LAWFUL CONDUCT

Petitioners were punished for the same conduct that the federal district court held was protected by

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9 *Id.* at 11-12.

10 In arguing waiver, Greenwood glides over the fact that Petitioners moved for a new trial. Greenwood cites no authority that an issue properly raised on a motion for new trial (as the due process issue of punishing lawful conduct was in this case) must also have been raised in a directed verdict motion.

the Commerce Clause, was the subject of a valid contract between Petitioners and Greenwood, and complied with Greenwood's designation of Second Avenue as the sole truck route through the city to and from Petitioners' quarry. Pet. 14-19. These factual circumstances distinguish this case from the nuisance cases cited by Greenwood and render the punitive award impermissible.

In arguing that punitive damages were constitutionally permissible and that Petitioners' conduct was not lawful, Greenwood incorrectly claims that Petitioners "conflate" the federal court litigation with the state court litigation and that the 1991 contract and Commerce Clause were not part of the state litigation. Opp. 15-16. In fact, the Missouri trial court admitted evidence of these matters for purposes of appeal. The trial judge kept this evidence from the jury because he felt he had "stunk this thing up with the federal proceedings enough."[11] Thus, the federal court's preliminary injunction order (which discussed the 1991 contract and Commerce Clause), federal court transcripts on Petitioners' motion for a preliminary injunction, and Petitioners' federal court complaints were all admitted for purposes of the appeal, with Greenwood's counsel's acquiescence, provided that they not go to the jury.[12] These documents fully support the argument, made in Petitioners' briefing to the Missouri Court of Appeals, that Petitioners had been punished for a "plainly lawful course of conduct, in which trucks used Second Avenue with Greenwood's express permission from 1991 to 2006, and with the blessing of a federal court after that."[13]

Greenwood attempts to recharacterize the truck traffic at issue as unlawful based on the incorrect assertion that the conduct contemplated in the 1991

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11 Vol. II Trial Tr. at 1760-61 (Mar. 12, 2008).

12 *Id.* at 1761.

13 Martin Marietta's Br. at 143 (Mo. Ct. App. Dec. 1, 2008).

contract, authorized under the federal court's preliminary injunction and under Greenwood's former ordinance, was "at most, the mere presence of trucks on Second Avenue" or truck traffic "in the abstract," as distinguished from "how the trucks drove and the severe impact they had on Greenwood."[14] Opp. 2, 23. Contrary to Greenwood's contentions, the "presence" of trucks necessarily carries an "impact," and when Greenwood entered the contract and when it designated Second Avenue for truck traffic, heavy quarry-customer trucks, filled with crushed rock, had been traversing Greenwood's roads for decades.

Moreover, when the federal district court held that Petitioners' conduct was protected by the Commerce Clause and contemplated under the contract, it had before it all of Greenwood's assertions as to the nature of the truck traffic at issue, including the dust and noise and the size, weight, and number of the trucks.[15] Pet. 2, 6-8. In its Commerce Clause balancing, the district court weighed these asserted harms to Greenwood. Thus, the asserted "deleterious impact" of the truck traffic, which is the basis of Greenwood's nuisance claim, was known to the federal district court, and does not render Petitioners' conduct unlawful or negate Petitioners' reasonable belief that their conduct was lawful.

In short, Greenwood sought and obtained a crushing punitive damages award for conduct that complied with its ordinance, was the subject of a

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[14] Furthermore, under the former ordinance, the quarry-customer truck traffic was not a "pig in a parlor" as Greenwood claims (Opp. 21), but was precisely where it was supposed to be — on the sole route designated by Greenwood for such traffic.

[15] *See, e.g.*, Pet. 43a (noting "[a]pproximately 600 trucks a day, a truck a minute, utilize Second Avenue. City of Greenwood is not a large city thus making the truck presence even more acute"); Greenwood's Br. at 14-16 (8th Cir. Apr. 1, 2009).

contract between it and Petitioners, and had been adjudged by the federal district court and the Eighth Circuit to be entitled under the Commerce Clause to the protection of a preliminary injunction, which was issued months before the state court trial. The imposition of punitive damages for such conduct is arbitrary, oppressive, and in violation of fundamental constitutional requirements of fair notice and due process.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS AS TO THE FEDERAL LAW STANDARD GOVERNING COMPULSORY COUNTERCLAIMS

According to Greenwood, this Court lacks jurisdiction to review the Missouri Court of Appeals' determination as to whether Greenwood's claims were federal compulsory counterclaims. Opp. 27-28. Greenwood's narrow view of this Court's jurisdiction is contrary to the broad wording of Section 1257(a), which endows this Court with jurisdiction to review a state court case "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a). Under Section 1257(a), the Court "possess[es] jurisdiction to review state court determinations that rest upon federal law." *Oregon v. Guzek*, 546 U.S. 517, 521 (2006). *See also* Eugene Gressman et al., *Supreme Court Practice* 151 (9th ed. 2007) (Section 1257(a) "covers the entire range of federal questions that can arise in a case in a state court"). Greenwood cites no judicial decision holding that issues regarding the Federal Rules of Civil Procedure are not within this Court's jurisdiction.

The Federal Rules of Civil Procedure are promulgated by this Court under authority exercised under the Rules Enabling Act. *Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010). Petitioners' invocation of Rule 13(a) was "specially set up or claimed" under that exercise of authority. Under Section 1257(a), this Court plainly possesses jurisdiction to review the Missouri Court of Appeals' determination on the compulsory federal counterclaim issue. *Cf. Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986).

Moreover, the Missouri court's holding presents an important issue of federal law that merits review by this Court. Rule 13(a) promotes the efficient, fair functioning and cohesiveness of the federal-state judicial system. *Cf. Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 598 (1991). It also furthers the jurisdiction of the federal district courts to decide an entire case or controversy, *see* U.S. Const. art. III, § 2; 28 U.S.C. § 1367(a), and the ability of a plaintiff in federal court to obtain effective resolution of his claims. The importance of this issue is not diminished because it arose in a state court. State courts frequently have occasion to address Rule 13(a) in determining the effect of a federal court judgment — an issue to which they must apply federal law. *See, e.g., Nottingham v. Weld*, 377 S.E.2d 621, 623 (Va. 1989) (citing cases). This case illustrates the harmful effect when a state court proceeds to trial and judgment on claims that should have been brought as federal counterclaims. The state court judgment collides directly with the federal district court's prior preliminary injunction, effectively prohibiting on pain of further punitive and compensatory damages the use of Second Avenue that the federal district court found to be protected under the Commerce Clause and under the contract between the parties.[16]

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[16] A preliminary injunction has been held to be a "judgment" for purposes of the Federal Rules of Civil Procedure and the relitigation exception to the Anti-Injunction Act. *See, e.g., NBA v. Minn. Prof'l Basketball*, 56 F.3d 866, 871-72 (8th Cir. 1995).

Greenwood incorrectly claims that Petitioners ask this Court to "address 'the misapplication of a properly stated rule of law.'" Opp. 29. To the contrary, the Missouri Court of Appeals applied legal criteria that are incorrect and that conflict with the legal standards articulated by the United States Courts of Appeals under Rule 13(a). The Missouri Court of Appeals erroneously looked to whether Greenwood's tort claims were based on the same legal theories and raised the same legal issues as Petitioners' claims before the federal district court. *See* Pet. 27-28. Most United States Courts of Appeals have held that the application of the compulsory counterclaim rule rests upon a shared *factual* nucleus, not common *legal* issues. *See, e.g.*, *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1196 (9th Cir. 2005) (examining whether "the counterclaim arises from the same aggregate set of operative facts as the initial claim" (citation omitted)); Pet. 27-28 (citing cases); *but see Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 711 (7th Cir. 1990). Here, the aggregate core of facts upon which Petitioners' federal court claims rested is precisely the core of facts from which Greenwood's nuisance claim arose. *See* Pet. 26-29. Indeed, Greenwood itself notes the "factual interrelatedness between the two cases." Opp. 31.

The cases cited by Greenwood do not support the Missouri Court of Appeals' determination that Greenwood's claims were not federal compulsory counterclaims. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), and *Parsons Steel*, unlike this case, involved prior-filed state court claims and thus do not implicate Rule 13(a). *See* Fed. R. Civ. P. 13(a)(2)(A). *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), and *McClellan v. Carland*, 217 U.S. 268 (1910), do not address compulsory counterclaims, but merely stand for the principle that a federal court generally may not enjoin a parallel state action.

Accordingly, this Court should grant certiorari to clarify the proper legal standard and analysis under Rule 13(a).

CONCLUSION

The Petition should be granted.

Respectfully Submitted,

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